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THE RIGHT OF EMINENT DOMAIN.

[*Continued from p.* 262.]

And now —

3. What is to be regarded as a taking under the Right of Eminent Domain?

(1.) Mere consequential damage cannot be held a taking; for it affects only the use of property, and follows more or less the exercise of other sovereign rights, as, *e. g.*, that of restricting the use of property. Losses of this kind, as we have seen, give no claim for compensation on any general rule.[1]

The State, then, may send its officers on a man's land to select, survey, and lay out sites for public works, and there is no taking of his property.[2] The officers of the State must have room wherein to move about and accomplish the sovereign will, and no man ought to look asquint at them while engaged in this duty, much less to treat them as trespassers, or to demand compensation, when he has suffered only such loss or inconvenience as every man must expect to meet with from the due performance of the functions of government.

But if there be a destruction of all beneficial use of property, consequential *of necessity* upon the action of the State, this (it would seem) ought to be regarded as a taking.[3] For the taking

[1] *Com.* v. *Tewksbury*, 11 Metc. 55; *Case of Phil. & Tr. R. R. Co.*, 6 Whart. 25.

[2] *Winslow* v. *Gifford*, 6 Cush. 327; *Can. Co.* v. *R. R. Co.*, 11 Leigh, 42.

[3] *Hooker* v. *R. R. Co.*, 15 Conn. 318.

or appropriation of private property is no technical term; and consequently, if the State, with forethought and intention, deprive a man of the whole value of his property or of any estate or interest in it, with a view to secure the public good, there arises a right to compensation. The man is in the same case as if the State had formally taken his property; it is a matter of indifference how the State deprives him of it, whether directly or indirectly; the point is, that the State, in the exercise of its Right of Eminent Domain has, in effect and intentionally, devested him of his property.[1] This would happen, *e. g.*, (in the case already once referred to,) where a State, after granting the right to build and maintain a toll bridge, should, afterwards, while this charter was still good, set up a free bridge so near as to draw substantially all the custom away from the first one, and to render that franchise worthless; in such a case, the right to take tolls, which is a franchise, and so property, would be substantially and intentionally taken for public purposes.

Nor is such a view at variance with the celebrated and well-supported case of *The Charles River Bridge* v. *The Warren Bridge*.[2] The main question in that case arose upon a legislative grant to the defendants, in 1828, of the privilege of building and maintaining a toll bridge, within a few rods of the plaintiffs' toll bridge, with a provision that, in six years, it was to become free. The plaintiffs held their franchise under a prior charter granted in 1785, to continue forty years, and this period had subsequently been extended to seventy years; this charter had not been forfeited, and was good, therefore, at the time of incorporating the second company, for nearly thirty years. The whole main question before the court arose under the Federal Constitution, and was simply this: viz. whether this second charter impaired the obligation of any contract in the first. And it was held that it did not, since the State of Massachusetts had not entered into any contract, that it would not exercise its sovereign power of providing convenient ways for its citizens; and since the franchise of the plaintiffs had been destroyed, if at all, in the due and natural exercise of this sovereign power.

But here is no decision that such a destruction of a franchise, as we have referred to, would not constitute a taking, and would not, as such, entitle to compensation; nor yet that the actual result of the charter granted to the Warren Bridge was not such a destruction of the franchise. On the contrary, the argument of the defendants who gained the case, put it expressly upon the ground, that there had been a taking under the Right of Eminent Domain;[3] one of the judges who went with the majority expressly admitted it;[4] and the opinion of the court is put upon grounds independent of this question.

[1] 2 Kent, 339, n.
[2] 11 Pet. 420.
[3] Greenleaf *arg.*, in 11 Pet. 420.
[4] McLean, J., in 11 Pet. 420.

It seems to be the true doctrine, in reference to such cases, that when property is taken by a State without compensation, in the exercise of the Right of Eminent Domain, although this may be a violation of the State Constitution, it is not of the Federal Constitution;[1] and therefore it is a matter for the consideration of the State court, and not for the tribunals of the Union.[2]

(2.) Supposing the State were to take land for the purpose of a turnpike road, and to pay the owner of it the value of a perpetual easement, and subsequently were to appropriate the same land to the purposes of a free highway, taking the franchise of the turnpike corporation by the Right of Eminent Domain, — would there be, therefore, a fresh taking from the owners of the fee in the land? It is true that the land might some time have been discharged from the easement, if it had not been appropriated to the highway, in case the corporation had failed in performing the conditions of its charter. But yet the land owner cannot complain or demand new compensation, since the State, in such a case, only continues the appropriation of his land to the same public purpose, (to wit, that of a public highway,) to which it was originally devoted, and he has been paid for a perpetual easement.[3] So long as the State continues its appropriation to the purpose of a public highway, there is no new taking; and therefore it might not only make the turnpike a free road, but it might authorize its use for a railroad, and yet the owner not be entitled to compensation, as for a fresh taking of his property.[4] The change might be exceedingly inconvenient, and might justly entitle the owner to compensation, but the claim would not arise under the Right of Eminent Domain.

But it is to be observed in all such cases, that if the easement be once abandoned, and the property in it revert to the owner of the fee, then it is sacred, and the public cannot touch it, except on a new and formal appropriation.

So also, on the same principles, the State can apply property already devoted to public uses, to any use of a similar character to that originally contemplated, while the original use still remains, and there will be no taking of a new estate in it; *e. g.*, it may authorize the construction and running of a railroad through the street of a city, and there will be no new taking from the original owners,[5] on the grounds given above. Nor, supposing the city corporation to hold the fee, is there any taking of property from

[1] *Ch. R. Br.* v. *Warren Br.*, 11 Pet. 420; *Can. Co.* v. *R. R. Co.*, 11 Leigh, 42; 2 Greenl. Cr. Tit. 275, s. 29, n.; *Tpk. Co.* v. *Lyme*, 18 Conn. 451.

[2] 2 Greenl. Cr. Tit. 27, s. 29, n.; McLean, J., in 11 Pet. 420.

[3] *Pierce* v. *Somersworth*, 10 N. H. 369.

[4] *Chase* v. *Manuf. Co.*, 4 Cush. 152; *Williams* v. *R. R. Co.*, 18 Barb. 222; *Case of Ph. & Tr. R. R. Co.*, 6 Whart. 25; *Pierce* v. *Somersworth*, 10 N. H. 369.

[5] *Donnahoe* v. *State*, 8 Sm. & M. 649; *Lex. & Oh. R. R. Co.* v. *Applegate*, 8 Dana, 289.

it ;[1] since, whatever interest it may hold besides, and in whatever character, it always holds an easement for the purpose of a public highway, in the capacity of trustee for the State ; and its power over *that* is limited to the making of police regulations.[2]

(3.) An interesting question involving this part of our subject, arose in the courts of New York and New Jersey, after the great fire in New York city, of 1835.[3] In order to arrest the conflagration, the city authorities had destroyed certain buildings which contained large amounts of property at the time, partly belonging to the owners of the building and partly to other persons. This had been done by virtue of an act of the legislature, empowering the mayor and any two aldermen, or any three aldermen, without the mayor, in case of fire, to destroy such buildings as they judged necessary to the end of checking the progress of the fire. Compensation was directed to be made to the owners of the buildings ; and this provision was extended by judicial construction to cover the loss of what was destroyed in the buildings, as well as that of the buildings themselves.[4]

But the owners of property destroyed in certain buildings, who were not owners of the edifices themselves, advanced a claim[5] in the courts of New York, in an action of *assumpsit*, on the ground that their property had been taken by the Right of Eminent Domain, and that the constitution of that State entitled them to compensation. It was holden, (to say nothing of other points in the decision,) that this was not a case of taking under the Right of Eminent Domain, and that the statute was only a regulation of that right of necessity which belongs to every individual in such emergencies, by the common law ; that it contemplated a state of things in which any person might have destroyed the property and been justified ; but, instead of leaving the necessity of such a course to be established by subsequent proof, it put the decision of that question into the breasts of certain officers, judging and determining on the spot. The compensation provided for the owners of the buildings, was regarded by the court as just and proper, but still as something which could not have been enforced by the judiciary, if the legislature had made no provision.

A similar opinion was given, on an action of trespass against the mayor and aldermen of New York, in the Supreme Court of New Jersey ; but it was subsequently overruled[6] by a higher court, where it was holden, that the statute of New York was passed in the exercise of the Right of Eminent Domain ; that it was not

[1] *Case of Phil. & Tr. R. R. Co.*, 6 Whart. 25; 8 Sm. & M. 649, Thatcher, J.; *R. R. Co.* v. *Applegate*, 8 Dana, 289.

[2] *Case of Phil. & Tr. R. R. Co.*, 6 Whart. 25.

[3] *Russell* v. *Mayor of N. York*, 2 Denio, 461; *Hale* v. *Lawrence*, 1 N. J. 714; *Print Works* v. *Lawrence*, *Hale* v. *Lawrence*, 3 ib. 590.

[4] Stat. N. Y. cited in 2 Denio, 461.

[5] *Russell* v. *Mayor of N. York*, 2 Denio, 461.

[6] *Hale* v. *Lawrence*, 1 N. J. 714.

a regulation of the common law right of necessity, and that where the right of necessity could be held to exist and to justify, the necessity must be expressly proved. Although the same case came up again[1] before the same court, and on a new state of the pleadings was differently decided, yet the court seems to have remained of the same opinion on the *principle*, as above stated.

Of these two opinions, it would seem that the one delivered in New York must be regarded as the more sound.[2] It is difficult and a straining of language, to call such a destruction of property, an appropriation of it, under the Right of Eminent Domain. The statute in question regards the property, for whose destruction it provides, as already doomed; and, in order to save other property, which otherwise must also be consumed, it directs certain officers to anticipate the action of the flames by destroying the first. Here is precisely a case of necessity. The public is benefitted by the destruction of a private person's property; and so, in some sense, the property is destroyed to produce a public benefit; but yet this occasions no loss to the owner which he would not have suffered otherwise. His property has been destroyed, indeed, by the order of the State, but if it had not been so destroyed, it would have been consumed by the fire; and the State has ordered its destruction only for a reason involving this fact. The private party stands just where he would have stood if the public officer had not lifted a finger, unaffected by their action, no better off, no worse. If this be an appropriation of property to public purposes, it is one that might be made by any private party, on the common law right of necessity.[3] But an appropriation under the Right of Eminent Domain can only be had by the order and authority of the State.[4]

At the common law, it is true, the necessity under which it is attempted to justify must be proved; this is necessary in order to guard against improvidence, recklessness, or evil design on the part of those setting up this plea — and it can have no other object. The manner of proving it can only be by the testimony of a proper number of discreet persons, with sufficient knowledge of the state of things at the time of the destruction of the property.

What hinders, then, to appoint a body of just and discreet men, such as "the mayor and two aldermen, or any three aldermen" of the city of New York must be supposed, as matter of law, to be, with the power of deciding conclusively upon the existence of such a necessity as to justify the destruction of property? Does not such a provision answer the ends of the proofs ordinarily required to establish a necessity?

[1] *Hale* v. *Lawrence*, 3 N. J. 590.
[2] 13 Barb. 32.
[3] 12 Co. 13; 4 T. R. 797; *Taylor* v. *Plymouth*, 8 Metc. 462; *Surocco* v. *Geary*, 3 Cal. 69.
[4] Grot. lib. 3, c. 20, s. 7, n.

It is true that the statute of New York did not, in terms, require the officers named in it to decide the destruction absolutely necessary; but that is unimportant. The state of things contemplated, was the existence of a fire, and the necessity of destroying property in order to check it. The decision, as to the existence of that necessity, was lodged with a board of responsible officers; and in order to prevent any unadvised action on their part, it was wisely provided that the owners of buildings destroyed, should be reimbursed by the city.[1] But those owners would have had no claim to compensation as a matter of strict justice. Such a claim against the parties whose property had been saved or who had been benefitted, might appeal with much cogency to their gratitude, but could have little force as directed to their sense of justice, — whether those parties were to be regarded as being either the more immediate neighbors of those whose property was destroyed, or the whole city.[2]

(4.) The violation of what is called "a contract of restraint" is not a taking of property.[3] By a contract of restraint, we mean an agreement that the legislature or the State shall forbear to do a certain thing. There may be a contract apparently partaking of this character, but so worded that it can be construed as a grant of exclusive privileges,[4] and in such a case it may be impossible to violate the contract without taking property. But a mere agreement of restraint, cannot, as we conceive, be so construed. It does not confer, or profess to confer, any property. Such an agreement only undertakes to bind the action of the legislature or of the State; and, although it may increase the value of property, it is in this respect on a par with much ordinary legislation. To violate such an agreement may or may not be open to objection on other scores, but it cannot, in any just sense, be regarded as a taking of property under the Right of Eminent Domain.

We come now to the subject,

4. *Of Compensation.* And under this head four principal questions present themselves, viz.: (1.) When should compensation be made? (2.) In what form should it be made? (3.) What should be the measure of it? (4.) How should it be ascertained?

(1.) *As to the time when compensation should be made.*

If the individual whose property is taken, is entitled to compensation for any part, he is, by the same reason, entitled to compensation for the whole; and in estimating it, the time when the

[1] 13 Barb. 32.

[2] In this connection we may refer to that principle of the law of shipping, by which "if a vessel be run ashore, voluntarily to save life, and is lost, and would unavoidably have been lost without the act, it is not a case for contribution or general average, for nothing was saved and no property sacrificed to save property." 3 Kent, 239, (n.) c.

[3] *R. R. Co.* v. *R. R. Co.*, 2 Gray, 25, Parker, *arguendo.*

[4] See *infra*, IV. 4.

property was taken enters into the account as an essential part. The obligation to make compensation, and the right to receive it, attach on the instant the property is taken;[1] the compensation, therefore, must be reckoned as due at that time; otherwise it is not compensation for the whole, and therefore not just compensation. For it would be manifestly unjust that government should take a man's property, reckon up its value, keep it, *e. g.*, twenty years, and then pay him no more than the value as originally estimated; and if it could not do this after twenty years, by what reason could it after a less time?

And as it is essential to the fulness of the compensation that it reckon from the time of taking, so it is important that it should be paid at the time of taking.[2] The State cannot place an individual whose property is appropriated, in the same condition as before it was taken; but it is manifest that the nearer it comes to this, consistently with the public good, which is its first care, the more justly it deals with him. Compensation paid at the time of the taking, is the utmost that the State can do, or the individual can ask.

Yet it may be impossible to pay with this punctilious promptitude; the public welfare may not justify the delay in taking, necessary to ascertain the value of the property; in such case the same supreme necessity that authorizes the assumption, may well justify a delay in making compensation;[3] and so the property may be taken at once in order to satisfy this public exigency, while compensation should be made as soon as may be, of which that legal interest ought now to make a part, which is regarded as full satisfaction for the delay.[4]

(2.) *As to the form, in which compensation should be made.*

(1.) May it be made, wholly or in part, in benefits to the remaining property? When the State takes a piece of land, as, *e. g.*, for a highway, worth five hundred dollars, and at the same time, by the public work or improvement for which it is taken, enhances the value of adjoining land, belonging to the same owner, to an equal amount, it is said that the owner has, by this means, received just compensation, and has no right to ask for anything more.[5] The State takes his land, indeed, but by the construction of the highway or other public work, it adds the full value of that land to his adjoining property.

But, in the case of many kinds of public improvements, the increase they occasion in the value of adjoining property, is simply

[1] *Parks* v. *Boston*, 15 Pick. 198.
[2] *Thompson* v. *R. R. Co.*, 3 How. (Miss.) 240.
[3] *Parks* v. *Boston*, 15 Pick. 198.
[4] 15 Pick. 198, per Shaw, C. J.; 2 Kent, 339, n.; 26 Wend. 497; *Thompson* v. *R. R. Co.*, 3 How. (Miss.) 240.
[5] *Symonds* v. *Cincinnati*, 14 Oh. 147; *People* v. *Mayor of Brooklyn*, 4 Comst. 419.

the measure of the owner's share in the general good, produced by the public work or construction; it would seem so, for example, in the case of railroads. In such cases, why is not the owner justly entitled to this increase without paying for it? For, it may be asked, what is the object of the State in constructing the public work, if not that general good, of which this individual's good is a part? Perhaps his share may be a larger one than falls to the lot of most members of the community, but it is in the nature of all public improvements to distribute their benefits with more or less of inequality.[1]

By making an individual's property, thus taken, serve as a kind of payment to the State for his share of the public benefit, that person is evidently put at a disadvantage as compared with other property-holders, whose land may adjoin the public work and yet not be taken, in any part, for the public purposes; and also, as compared with the great mass of neighboring property-owners, who, all of them, receive the bounty of the sovereign freely.[2] The State, while undertaking to make recompense for property taken in benefits, seems to occupy the unworthy position of effecting a barter with those sovereign benefactions which it is the whole end of its being to work out and dispense.[3]

If it be said, however, that this is only a kind of taxation — that all who are specially benefitted ought to contribute specially — and that whether others are made to do so or not, it is at least an approach to equality upon the whole, if the individual in question and all who may have any property taken for this public work, are held to pay their proportions[4] — this is partly answered already, by what has just been said. It may be said, however, that if others who are specially benefitted, without losing any property, are not obliged to pay for their special share, (and this is rarely, if ever, required, excepting, sometimes, when improvements are made in cities,) then it would seem that those whose land is taken, might justly complain of this method of approaching equality; they might be pardoned for not readily seeing the equality. Besides, if this reasoning be good, why are not *all* the benefits which these parties receive, offset, — those affecting, not merely the lands of which that taken was part, but also other lands, more or less near, belonging to the same owner? But this, it is admitted, ought not to be done.[5] Still further, it will often happen that the increased value of adjoining property is not, so far, nor to any extent, a compensation. A man's property may be more valuable in the market

[1] *People* v. *Mayor of Brooklyn*, 6 Barb. 209.

[2] *State* v. *Miller*, 3 N. J. 383.

[3] *Keasy* v. *Louisville*, 4 Dana, 154; *People* v. *Mayor of Brooklyn*, 6 Barb. 209; *Symonds* v. *Cincinnati*, 14 Oh. 147, per Read, J.

[4] *People* v. *Mayor of Brooklyn*, 4 Comst. 419; *Rexford* v. *Knight*, 15 Barb. 627.

[5] 8 Watts, 243; *State* v. *Digby*, 5 Blackf. 543; *James River Co.* v. *Turner*, 9 Leigh, 313.

and yet of no more worth, but rather of less, for his own use.[1] In such case, that can hardly be called a just compensation, which, while it serves to increase a man's taxes, can only be made available for any benefit, by his selling himself out of house and home; and, in that event, if he do sell his property and pocket this increase in its value, he will find, if he seek to locate again anywhere in that neighborhood, that his was not the only property that increased in value.

But admitting compensation by benefits to be impolitic and unequal where property is taken, so far as intended to be payment for the property itself, yet it is sometimes said that it may justly be made to balance consequential losses; that where the damage is consequential, it may well enough be offset by consequential benefit.[2]

As to which, it is to be said that consequential damages ought not, on any general rule, to be awarded to the owner of property taken any sooner than to other persons; why shall not the same principle apply here as in all other cases of consequential loss? And still further, that what is sometimes called consequential damage, in this connection, would seem not to be such in fact, but rather a portion of the value of that which is taken; as, *e. g.*, the expense to which the owner of land is put for fencing where the State takes a strip out of the middle of his field; here the position of the land must enter into any fair estimate of its value; it is not, merely, so many feet of land that is taken, but so many feet of land in the middle of a man's field.

But if, in particular instances of legislation, compensation is directed to be made for consequential loss or damage, there would seem no valid objection to a provision that consequential benefit should be offset.[2]

After all that has now been said, it must be admitted, nevertheless, that the weight of authority appears to be in favor of allowing compensation by benefits.[3] It would appear that considerations of a practical nature, not easily susceptible of estimation on our pages, have something to do with this course of legislation and doctrine; the State, it is said, is compelled to pay extravagant prices for property taken; and an assumption by the public is, for this reason, apt to be courted as a favor. It may be, that provisions for payment in benefits are partly designed to reimburse the State for this alleged compulsory excess in its outlays. But it

[1] *People* v. *Mayor of Brooklyn*, 6 Barb. 209; *Jacob* v. *Louisville*, 9 Dana, 114.

[2] *Jacob* v. *Louisville*, 9 Dana, 114.

[3] *Livermore* v. *Jamaica*, 23 Verm. 36; *Com.* v. *Sess. of Middlesex*, 9 Mass. 388; *People* v. *Mayor of Brooklyn*, 4 Comst. 419; *Rexford* v. *Knight*, 15 Barb. 627; 4 Whart. 47; *Symonds* v. *Cincinnati*, 14 Oh. 147. It may be said, however, of many of these decisions, that they only pass upon the power of the legislature, under the constitution of the State. We are here discussing the *duty* of the legislature on general principles.

would seem that this state of things, viz.: such excessive value put upon property, allowing all that is said to be true, ought to be accepted by the State as inevitable; as a part, so to speak, of its discipline; it can hardly furnish a justification for retaliatory measures, of a questionable character in themselves, retorted by the sovereign upon the citizen.

But, at all events, the conclusion indicated above, that compensation ought not to be made in benefits, seems, on principle, the sound one. It has the assent of various weighty authorities,[1] and has passed, as a specific provision into one, at least, of the more recent State constitutions.[2]

(2.) What then ought to be the form of compensation? It is manifest that it ought to be in some such shape, that it will be of a certain and steady nature, so far as may be, and as complete a substitute for the property taken as may be. And this is almost the same as to say that it ought to be in money, the fullest representative of everything that has legal value.[3]

(3.) *As to the measure of compensation.*

It has been observed repeatedly that no consequential damages, properly so called, ought to be allowed, as a general rule, in making compensation when property has been taken under the Right of Eminent Domain. What was said on a preceding page as to consequential damages in general, would seem to apply with equal force, when such damages are claimed by a party whose property is taken by the State.

The measure of compensation, then, should be the value of what is taken, and the value of it at the time it is taken;[4] which is the time, as we have seen, when the right to compensation arises, and when, if possible, it ought to be paid. For on what principle can we fix on any other time, before or after? And what shall that time be?

It would follow, then, if a man had purchased property and was holding it in expectation of a rise in its value, and it should be taken for public purposes, that no allowance could be made in his compensation for expected profits.[5] It might be true that if the man were free to act, he would not sell this property on the day it is taken, for the market value of it on that day; but the true question, it is conceived, in ascertaining his compensation, would be,

[1] 2 Kent, 339, n.; *State* v. *Miller*, 3 N. J. 383; *People* v. *Mayor of Brooklyn*, 6 Barb. 209; *Hatch* v. *R. R. Co.*, 25 Verm. 49; *Keasy* v. *Louisville*, 4 Dana, 154; *Rice* v. *Tpk. Co.* 7 Dana, 81; *Jacob* v. *Louisville*, 9 Dana, 114; *Symonds* v. *Cincinnati*, 14 Oh. 147, per Read, J.

[2] Ohio State Const. (1851) Art. 1, s. 19.

[3] 2 Kent, 339, n.; *Jacob* v. *Louisville*, 9 Dana, 114; *Van Horn's Lessee* v. *Dorrance*, 2 Dall. 304; Rawle on Const. 134.

[4] 2 Kent, 339, n.; *Jacob* v. *Louisville*, 9 Dana, 114; *Parks* v. *Boston*, 15 Pick. 198; *R. R. Co.* v. *Dougherty*, 2 N. J. 495; *Canal Co.* v. *Archer*, 9 G. & J. 479.

[5] *Jacob* v. *Louisville*, 9 Dana, 114; *Canal Co.* v. *Archer*, 9 G. & J. 479.

not what would he sell it for to-day, or what would any other man, if he owned it, sell it for to-day; but rather, it being settled that he *must* sell it to-day, what could it reasonably be expected to bring in the market at this present time.[1] The present market value of the property is regulated, to a certain extent, by the general prospect of a rise, and the owner is entitled to the benefit of that prospect; but beyond this, all is mere speculation. The loss of any further profit, anticipated from a continued possession of the property would seem to be, at best, one of those consequential losses whose character has been already sufficiently indicated.

One qualification ought, however, to be added, and that is, that while the measure of the compensation should be the market value of the property at the time it is taken, allowance ought to be made for any effect that the proposed improvement may have had upon its value, whether in raising or depressing it. For, on the one hand, if the value has been increased, it would be unjust that the State should be obliged to make compensation for that increase, and so to buy back its own gifts. And on the other, if it has been lessened, it would be unjust to the owner of the property that the State should come in and reap, in behalf of the public improvement, the benefit of that loss which this improvement itself had occasioned. In a case like this, in this sense, and to this extent, it would seem that consequential damage should be considered.

On the principle now laid down, it would appear that if benefits are to be allowed in the making of compensation, they should be reckoned as they exist when the property is taken; and not as they probably will exist at some future time. If it be said that they ought to be reckoned as they will stand when the public improvement or work is completed,[2] it may be objected, first, that such benefits are a mere matter of speculation, and no certainty; and second, that a future increase in the value of property cannot be called just compensation for property taken to-day; — at least not for property of the same nominal value. Compensation, it would seem, ought to be something certain, and available at present.

But if not only benefits are to be offset, but benefits as they will exist at a future day, then, one would suppose, the value of the property taken ought also to be reckoned as it will stand at the same future day.

But as we have taken the view that benefits ought not to be offset at all, it is hardly necessary that we should enter farther upon these hypothetical questions.

(4.) *As to the manner of ascertaining the compensation.*

Where no restriction is placed upon the action of the legislature, the mode of ascertaining compensation must be at the discretion of

[1] *In matter of Furman Street*, 17 Wend. 669. [2] 19 Wend. 679.

that body,[1] and all that could be said on that head, in any such case, would be, that it should be ascertained in some manner which should be just to all parties. If the State agents and the individual can agree between themselves, of course there is no difficulty. But if they cannot, it would not be fair to the individual that those same agents of the government who have differed with him should have the settlement of the question. Some tribunal or umpire ought to be set up or indicated, to decide upon the question as a disinterested party.[2]

Under our State constitutions the legislature could not pass upon the value of the property; for this would be a judicial act.[3]

A diversity exists in the practice of our States; in some, compensation is ascertained, as it is in England for the most part, through a jury duly summoned;[4] in others, through commissioners or appraisers, appointed for the purpose by the legislature. Each of these methods seems unexceptionable on principle; and the frequent resort to both of them would seem to indicate that both are found good in practice.

IV. And now it is proposed to consider whether the State itself, or its agents appointed to legislation, can part with, or in any degree diminish or restrict the Right of Eminent Domain, by way of contract with corporations or private persons.

And herein:

1. Of the power of the State.
2. Of the power of the legislature.
3. Of grants of exclusive privileges.
4. Of grants, with contracts of restraint annexed.

1. *As to the power of the State.*

We saw at the outset of our investigation that a distinction must be made, in considering the origin of government, between government and the form of it; that the latter, whenever the government is a rightful one, and indeed always in some sense, is what it is, by the will of the people; but that the former, to wit, government itself, has a far higher and more mysterious origin, which is nothing less than a necessity in the nature of man.[5] And we saw also that since government is necessary, all that it implies is of equal necessity; as, *e. g.*, sovereign power, residing somewhere, and the rights of sovereignty, such as the right of prescribing rules of conduct; of collecting revenue; of appropriating private property to public uses.

[1] *Com.* v. *Fisher*, 1 Penn. 466.

[2] 2 Kent, 339, n.; *Beekman* v. *R. R. Co.*, 3 Paige, 45; *Taylor* v. *Porter*, 4 Hill, 146; *Backus* v. *Lebanon*, 11 N. H. 19; *R. R. Co.* v. *Chappell*, 1 Rice (So. Ca.) 383.

[3] *Cushman* v. *Smith*, 34 Me. 262.

[4] Stat. 8 Vict. ch. 20.

[5] Puff. lib. 7, cap. 3, s. 2.

The necessity in which government originates, is that of protecting, securing, and promoting the natural and inalienable rights of man to life, liberty, and the pursuit of happiness.[1] But for these great ends, which the State alone can compass, there would be no State; its sovereign rights exist only by reason of these ends; must be limited by them; must remain so long as they remain to be accomplished, and must be co-extensive at all times with all that they require.

The compassing of these ends comprises the duty of the State, which is not imposed by its consent, and cannot be laid aside at its pleasure; and therefore the State cannot lay aside, or part with, or restrict the power of performing it.[2] The rights of sovereignty, like the natural rights of man, are inalienable.

It must be noticed that we are not now speaking of what the State may do in the establishment of a new government, to which head that transfer of power from thirteen independent States to the Federal Government of the United States, which took place in this country in 1787 and the years immediately following, is to be referred, nor of what it may do, under pressure of necessity, in its relations with other States. Our whole inquiry is directed to the power of the State in its relations to its own subjects or citizens.

And it seems to follow from what has gone before, that no exemption of property from the Right of Eminent Domain, by one constitution, ought to bind the State in making another constitution. It can, in general, serve only to restrain the action of the officers appointed under the instrument containing it.

2. *As to the power of the Legislature.*

(1.) It is manifest that the State may restrain the action of those whom it intrusts with its sovereign rights, in any way it pleases; it may award them full, or only partial and limited sovereignty. And it is clear, that a legislature existing under a written constitution must be bound by any such limitations, whether expressed or necessarily implied. And, again, it is clear that, beyond any such plain restrictions or limitations, the sovereign power is all delegated; the legislature is the full representative of the State, in its legislative functions; its duties are the same, its rights and powers the same.[3] It would also seem plain that the legislature cannot derive any right from the sovereign, of which he himself was not possessed.

But yet the sovereign might confer power upon the legislative body to restrict any sovereign right by contract, *e. g.*, the Right of Eminent Domain, so far as to bind itself and all the other departments of government; although, if our reasoning has been good,

[1] Puff. lib. 7, cap. 3, s. 2.
[2] Puff. lib. 8, cap. 5, s. 7.
[3] 1 Blackst. 139; *R. R. Co.* v. *Davis*, 2 D. & B. 451.

such a contract could not, for a moment, bind the State itself, acting in its sovereign capacity. Such a contract, made under such circumstances, would bind the legislature in any event, as matter of right; and it would, as matter of law, if we suppose the State to provide against impairing the obligation of contracts, as is done in the United States' Constitution.

But if the State should make no such grant of power to the legislature, then, (it would follow from what has been said,) that body would have no power to part with its sovereignty, or to diminish or restrict it.

Accordingly, in no event ought the action of the legislature to be construed as an attempt to do this, when it is susceptible of any other construction, reasonably possible.[1] For if the legislature has not the power to do it, such a construction would make that body to assume an unconstitutional function. And even if it has the power, it is not readily to be believed that it has exerted it, since this would be entering into a covenant to desert its duty, and surrendering a power which it is of the utmost importance to the public to preserve.[2]

But what if the legislature, having no authority to that effect in the constitution, should, nevertheless, exercise its power against its duty, and attempt, unmistakably, to make a transfer of its sovereign rights and powers, or to put a restraint upon their exercise by way of contract? Must it abide by such an agreement?

Leaving out of view, at present, any provision in the constitution expressly holding it to its contracts, we must answer this question in the negative. The sovereign body is indeed pledged — but to what? To that which is directly counter to the great end of its existence and the supreme law of its action. The delegate of the State has sought to put limits to that power which its paramount law and duty required should be unlimited. The duty of the legislature still remains, and is still of supreme obligation, viz.: to compass the great ends of government, by any and every means that falls within the range of full and unfettered sovereignty; and, therefore, all the power which the State lodged with that body must remain. It would therefore be the duty of the legislature, in such a case, to hold itself unimpeded by such an agreement, so far as the accomplishment of the ends of government, in the exercise of the powers delegated to it, might require. Nor would this be a violation of good faith, since all parties knew or should have known that the legislature was transcending its rightful power.

But if, when such an agreement be made by such a legislature, there be a constitutional provision like that in the organic charter

[1] *Prov. Bank* v. *Billings*, 4 Pet. 514; *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420.

[2] *Prov. Bank* v. *Billings*, 4 Pet. 514; 2 Greenleaf's Cr. Tit. 27, s. 29, n.

of the United States, forbidding any legislative action impairing the obligation of contracts; what shall we say now? Is not the legislature firmly bound now, and may not the judiciary hold it to its agreement?

Again, it would seem not. It can hardly be supposed, that the State, by such a provision, intended to bind its delegates to adhere to an agreement which the State itself would have no right to bind itself by; or to ratify the exercise of a power which the State itself does not possess, acting in its own sovereign capacity. Legislative power is given to such a body as this, whose power we have supposed to be unrestricted, to use and exert in any manner and to any extent that the State itself may use it; nor is it a natural construction of a provision forbidding to impair the obligation of contracts, to say that it gives to the legislature a power which otherwise it would not have, that of restricting or parting with its sovereignty; and this is the effect of the construction in question. It would seem rather that the name of contract is not the one to apply to such action of the legislature; that the rights and powers of sovereignty cannot form the subject-matter of a contract;[1] and, therefore, that the constitutional provision, now referred to, would not apply to a stipulation or agreement of this character.[2]

(2.) So far, our reasoning has supposed, that power was not denied to the legislature to make an agreement parting with, diminishing, or restricting its sovereignty. If in any case it be denied, then, in reference to that case, this discussion is at an end.

Is there not such a denial, if not in terms, yet, what amounts to the same thing, by necessary implication, in all our American constitutions?

In these constitutions, the legislative power, which includes all implied in the Right of Eminent Domain, is conferred upon a body of individuals who are to be chosen, from time to time, according to prescribed rules and forms. It is not given to one legislature, nor to one legislature more than another, but in general, *to the legislature;* on any and every body, assembled, or to be assembled, according to the provisions of the constitutions, as the legislature, sovereign legislative power is conferred — upon one as much as another. Each, in every essential particular of sovereignty, is to be the equal, to the utmost, of every other. The whole sovereign power (so far as it is delegated at all) must lodge, full and intact, in each.

Such is the necessary construction of these constitutions. And what does this show, if not that they deny to any one legislature

[1] *Brewster* v. *Hough*, 10 N. H. 138; *Backus* v. *Lebanon*, 11 N. H. 19; *Pisc. Br.* v. *N. H. Br.*, 7 N. H. 35; *B. & L. R. R.* v. *Sal. & L. R. R.*, 2 Gray, 1, Parker, *arguendo.*

[2] 2 Pars. Contr. 529; *Enfield Br. Co.* v. *R. R. Co.*, 17 Conn. 40; *Can. Co.* v. *R. R. Co.*, 4 G. & J. 454; per Dorsey, J.; Am. Law Reg. (Feb. 1856), 213.

the power of parting with, diminishing, or restricting its sovereignty, so much as one iota?[1]

And yet, of course, each legislature may do everything that can justly be called *an exercise* of its sovereign power, and, so far as this goes, each may affect the action of its successors; for the power was given to use, and if we say that it may not be exerted so as to limit the action of subsequent legislatures, this would render the act of the State in conferring it, absurd and nugatory. Every legislature must respect the rights acquired under the laws, grants, and contracts[2] of its predecessors; for those rights, when once acquired, have their virtue, and operate according to the law of nature. If this were not so, society could not hold together, and the action of the legislature would tend, not to secure, but to subvert the ends of government. It is not necessary, then, that each legislative body should have the same power, that is, be free to do the same things, as if no other legislature had acted; that never can be; each may be obliged to respect acquired rights, and yet be sovereign; otherwise the law of nature and the rights of the State would be at war, and one or the other must be exterminated. But it is no part of sovereignty to claim exemption from that law of good faith, which is the vital air of society.

But how is it when a legislature seeks to touch the essential sovereignty, or to part with any portion of that? Suppose, for example, it stipulate, in any form whatever, that property shall not be subject to the Right of Eminent Domain; must its successors hold themselves bound by this? There is but one answer. It cannot.[3] For how otherwise shall we say that the full measure of sovereignty has come to them? The distinction cannot be set up, in such a case, which is thought to justify the legislative exemption of particular property from the right of taxation, — to wit, that although particular property is exempted, yet the sovereign *right* of taxation remains; because the Right of Eminent Domain is manifestly entire, and stands wholly in this, viz.: in the power to assume any private property whatever, that the public exigencies may require. If the legislation in question be good and binding upon future legislatures, then the public exigencies may clamor ever so loudly for *some* property, and they cannot be satisfied. And why? For no reason but that one body has stripped from its successors the fulness of their power. To enter into such a stipulation with the intention of binding subsequent legislatures, is not merely the exercise of a delegated and shifting sovereignty, but it is rather an attempt to probe to the very centre and seat of it, and to paralyze it in a vital point.

[1] *Piqua Bk.* v. *Knoop*, 16 How. 369, Campbell, J.; *Debolt* v. *Ins. & Tr. Co.*, 1 Oh. St. 563; *Turnpike Rd.* v. *Husted*, 3 Ibid. 578.

[2] Grot. De Jure B. & P. b. 2, ch. 14, s. 6, 2; *Dartmouth Col.* v. *Woodw.*, 4 Wheat. 218; *Fletcher* v. *Peck*, 6 Cranch, 87; *Terrett* v. *Taylor*, 9 Ibid. 43.

[3] *Piqua Bk.* v. *Knoop*, 16 How. 369, Campbell, J.; *Debolt* v. *Ins. & Tr. Co.*, 1 Oh. St. 563; *Tpk. Co.* v. *Husted*, 3 Ibid. 578.

3. We are ready, by this time, to dispose of one or two practical questions, the answers to which depend on principles now sufficiently discussed. And first, can the legislature, under constitutions like ours, make a grant of exclusive privileges?

If such a grant imply anything impairing or abridging the sovereign power, we are prepared to answer it, on the grounds taken within the last few pages, in the negative. Our question then is reduced to this, whether there be anything of this character, in such a grant; for, otherwise, we are not aware of any objection that can be raised against it.

And it would seem clearly, that there is no implication in a grant of exclusive privileges, (such, *e. g.*, as a grant of the exclusive right to build and maintain a bridge within certain limits,) that shuts off the free action of sovereign power. For the legislature may certainly grant land or a franchise, and, so far as it may go, it may grant the exclusive possession. If it grant the right to build and maintain a bridge, the right is certainly exclusive, so far as the space occupied by the bridge itself is concerned; otherwise the grant is nugatory; but it is not exclusive of the sovereign, acting as sovereign, as we saw some time since; no such idea of exclusion is attached to the grant. How does the case differ, if, *e. g.*, the legislature grant to a corporation in express terms, the exclusive right within a line of five miles along the river? Why shall it be said here that the sovereign is excluded? Is such a construction necessary? Is not the other construction a natural and fair one? [1]

4. But suppose the legislature to make a grant similar to the one first mentioned, and, instead of making it in terms exclusive, to add a stipulation, (to take, *e. g.*, the case of a railroad,) that no other party shall be authorized by the State, to build or maintain a railroad within certain limits mentioned, during a certain term of years; here we have an express contract of restraint.

In considering this question, a distinction suggests itself which has already been once adverted to.[2] A bare contract of restraint, is one which undertakes only to bind the action of the legislature or the State, and the one first instanced is of this character. But if we suppose a legislature to contract, *e. g.*, "that no railroad *shall be allowed* to be constructed" within the limits named, — these terms have a more extended meaning than the former; for they undertake to bind the legislature, not merely to refuse its authority to build another road, but to prevent another from being built; *i. e.*, to render it unlawful for private parties to build another, if they should undertake it without seeking authority of the State. The manifest intention of such a provision is to confer the exclu-

[1] *West. Riv. Br. Co.* v. *Dix*, 6 How. 504; *Pisc. Br. Co.* v. *N. H. Br. Co.*, 7 N. H. 35.

[2] See *supra*, III., 3, (4.)

sive privilege, and such a contract might be construed, it seems, as a grant of an exclusive privilege.[1]

But a bare contract of restraint does not appear susceptible of such a construction. This relates to no action other than that of the State or its agents. The legislature is bound, if the contract be good, not to give its sanction to another road; but it is not bound to forbid it, if its sanction is not necessary.

Such a contract purports to suspend the Right of Eminent Domain for a certain number of years, and to strip the legislature of power to take certain private property, whatever may be the public exigencies, and although they may flatly demand it. So far as it does this, our previous argument seems to prove that it is no good contract. No legislature is bound by it, to this extent, and the judiciary must continue to regard the region to which it relates, as still subject to the Right of Eminent Domain.

It is said, on the other side, by way of maintaining that such a contract of restraint actually binds the legislature, that the power to grant franchises implies the power to fix the term of their continuance; that the power to grant is unlimited, but the power to impair the contract is expressly limited.[2] And thus, by indirection, we get at the conclusion that the legislative body may, at least, restrict the Right of Eminent Domain, in the hands of itself and its successors.

But, on the contrary, we have aimed to show that the power to grant or make contracts does not imply the power to fix the limits of the continuance of the grant or contract, in such a sense as to trench on sovereignty; that such a power appears to be denied in our constitutions; and, therefore, that the power to grant is, to this extent, and in this sense, limited; and, as a consequence, that the provision in the Federal Constitution forbidding to impair the obligation of contracts is irrelevant, when cited in support of such unauthorized agreements.[3]

It is further said, that, at least the legislature cannot grant a rival franchise within the given limits, in the case supposed, whatever else it may do or require, in virtue of its Right of Eminent Domain. But that seems to depend altogether upon the question whether the public exigencies demand it. If they do, the legislature may certainly require the building of another bridge within those limits; and if the corporation already in possession will not build and maintain it satisfactorily, the State may build and maintain it for itself; and if so, why may it not do the same thing, if the public exigency require, through another corporation? If it can do it at all, it must act through agents; and if it may act

[1] 2 Pars. Cont. 523.

[2] *Ch. R. Br. Co.* v. *Warren Br. Co.*, 11 Pet. 644, 645, per Story, J.; *Richmond R. R.* v. *La. R. R.*, 13 How. 71, per Curtis, J.

[3] 2 Pars. Cont. 523; 2 Greenl. Cr. Tit. 27, s. 29, n.

through one class of agents, why not in an exigent case, (of which it is the judge,) through another?[1]

The Right of Eminent Domain implies the power of judging when a public exigency has occurred, and what it requires; and if one legislature may not deprive its successors of this Right, neither, it would seem, can it take from them this power of deciding on what the exigency demands. If, therefore, the legislature may exercise the Right of Eminent Domain over certain property, at all, it may exercise it in full; since it is not a reasonable construction of the clause in the United States Constitution forbidding the impairing of the obligation of contracts, to make it transfer to the judiciary any portion of the legislative right, or to make them joint-holders with the legislature.

The true construction of this clause would seem to leave the Right of Eminent Domain, in the several States, unaffected; so that wherever the action of a State legislature may be referred to this head, wherever it amounts to an appropriation of private property to satisfy a real public exigency, there the mouth of the judiciary, so far as this clause is concerned, would be closed.[2]

And, therefore, consistently with this, it might well be held that an attempt to make the public creditors accept their money before the time fixed in the contract, by recalling the public securities in private hands, would be unconstitutional.[2] Such a proceeding could not be referred to the Right of Eminent Domain, for the State could never need the mere paper on which they were written. The whole object of such a proceeding must be, to oblige the creditors to accept their money before the time fixed; if this object be a legitimate one, it does not require the surrender of the paper; and, although, in some sense, the public debt (abstracted from the public securities) may be said to be private property, yet it would be doing violence to language, to say that an attempt to pay the public debt was a taking of private property under the Right of Eminent Domain.

So, too, the transfer of real property or a corporate franchise from one private party to another, merely for private purposes, would be a violation of the clause in question;[3] it could not be referred to the Right of Eminent Domain, for, by the statement of the case, there is no public exigency.

V. We come now to an inquiry into the proper construction of that clause in the constitutions of the Federal Union and a majority of the United States, which provides that "private property shall not be taken for public purposes without just compensation."

It has been attempted, on a preceding page, to show that, where

[1] 11 Pet. 562, Op. of McLean, J.
[2] 11 Pet. 420, McLean, J.
[3] 2 Kent, 240; *Beekman* v. *R. R. Co.*, 3 Paige, 45; *Fletcher* v. *Peck*, 6 Cranch, 88.

no such constitutional provision exists or can be necessarily implied, the legislature might take private property for public purposes, without making or providing for compensation at the time; *i. e.*, that it would have this power, in such a sense that the judiciary could not interfere.[1]

Where this provision does exist, there may be several views as to its precise effect.

1. It may be regarded as simply the expression of an obligation resting on the legislature by the principles of universal law. According to this view, the legislature might take private property by the Right of Eminent Domain, and omit to make or provide for compensation; that is, it might do so, and yet the judiciary could not interfere, although, in a political sense, the legislature would violate its duty in so doing.

But this construction is justly rejected, by reason of the uncertainty, delay, difficulty and possible expense to which the citizen would be subjected in obtaining his compensation.[2] Besides, if the provision in question means only this, there is no need of it.

2. Another view would regard the legislature as absolutely forbidden to authorize the taking of private property, without compensation made on the spot, contemporaneously with the taking.

This would be going to the other extreme, and is objectionable as denying to the legislature power to provide for cases of actual State necessity, and as limiting too strictly the power of promoting the public welfare; in other words, as being inharmonious with the ends of government, and attended with too many practical difficulties.[3]

(3.) A third view would look at the provision in question as rendering compensation itself, or a legislative provision for compensation, essential to the constitutional exercise of the Right of Eminent Domain.

A law which contained no provision for compensation might, nevertheless, even on this view, be constitutional; for although it should professedly authorize the taking of private property, yet it might be construed as a permission to the party taking, to take on agreement with the owner.[4] Nor would such a construction be nugatory; as, *e. g.*, in the case of a corporation. And again such

[1] *Rexford* v. *Knight*, 1 Kernan, 308; *Lindsay* v. *Com'rs*, 2 Bay, 38; *Dawson* v. *State*, Riley's Law Cas. 103.

[2] *Comins* v. *Bradbury*, 1 Fairf. 447; *Pisc. Br.* v. *N. H. Br.*, 7 N. H. 35; *Thatcher* v. *Dartmouth Br. Co.*, 18 Pick. 501; *Bloodgood* v. *R. R. Co.*, 18 Wend. 9.

[3] *People* v. *Hayden*, 6 Hill, 359; *Rogers* v. *Bradshaw*, 20 Johns. 740; *Cragie* v. *Weller*, 6 Mass. 7.

[4] *Pisc. Br.* v. *N. H. Br.*, 7 N. H. 35; *Thatcher* v. *Dartm. Br. Co.*, 18 Pick. 501.

a law would be constitutional, if amended, subsequently and before the taking, by a provision for compensation.[1]

And, therefore, it has been held, that the true and best way of enforcing the provision of the constitution is by means of injunctions.[2] Such a view, however, would leave those States unprovided for, where there is no power of granting injunctions.

Both on principle and authority, that seems to be the best doctrine on this head, which empowers the judiciary, (subject to the qualifications suggested in the paragraph but one preceding,) to declare that law, to be without the compass of legislative power and void, which undertakes to authorize the taking of private property, and makes no provision for compensation.[3] Such a construction seems to be necessary, as well for the due execution of the sovereign will declared in the constitution, as for the complete protection of the citizen.

Should the law do nothing more than direct the State agents to make compensation, without fixing any way of ascertaining it, this would be no advance on a law which should say nothing at all upon the subject; since the State agent may have one idea of compensation and the property-owner another, and there is no umpire. The owner is not to be compelled, under such a law, to submit to the decision of the agent, or to that of any tribunal or umpire he may name; it would be as reasonable, to oblige the State agent to pay the owner whatever he insisted on, and that would be entirely out of the question. So that, under such a law, the only fair construction of the word compensation, would be, such compensation as the parties may agree upon; and this would be as if no provision had been made, because the parties would then have had the same power to agree, and so to authorize the State agent to take.

Therefore the law, in order to be constitutional, must, in general, provide not merely for compensation, but for a method of ascertaining it.[4]

We have seen that the State itself need not provide always for contemporaneous payment, and it would seem that the same should hold good of any legislature, acting under the provision in question. Such a construction is necessary, lest the sovereign power be unduly trammelled, and this important Right of Eminent Domain be "frittered away to a mere right of preëmption."[5]

But, in strictness, such a delay is allowable, only where the public good appears to demand it. Where this is the case, the

[1] *Bonaparte* v. *C. & A. R. R.*, 1 Bald. C. C. 205; 2 Kent, 339, n.
[2] 2 Kent, 339, n.
[3] *Tuck. Can. Co.* v. *R. R. Co.*, 11 Leigh, 42; *Gould* v. *Glass*, 19 Barb. 179; *Thatcher* v. *Dartm. Br. Co.*, 18 Pick. 501; *Pisc. Br.* v. *N. H. Br. Co.*, 7 N. H. 35; *Bloodgood* v. *R. R. Co.*, 18 Wend. 9; *Comins* v. *Bradbury*, 1 Fairf. 447.
[4] *Bloodgood* v. *R. R. Co.*, 18 Wend. 9.
[5] *Ch. Riv. Br. Co.* v. *Warren Br. Co.*, 11 Pet. 420, Greenleaf, *arguendo*.

individual whose property is taken, ought to be put to no hazard of losing his compensation; and not only ought compensation to be directed to be made as early as may be, but a competent fund should be provided, to which the individual may look with certainty of ultimate satisfaction; and he should have at hand the means of enforcing payment when ascertained and justly due.[1]

The State purse would be such a competent fund;[1] there could be no higher security than this would furnish, since its supplies are drawn from every purse in the community. And so of the public purse of any local community; if such a community may be authorized to take private property, it is enough, by way of compensation, that it pledge the public treasury, since it can furnish nothing more secure than that fund which is fed from every pocket in the community.

And as to the means of enforcing compensation, it would seem sufficient that the legislature make it the duty of the proper public officers to pay at the proper time; for the presumption must be that they will do their duty; and if they fail, the sovereign writ of mandamus will issue from the courts, by which the State visits its lagging or reluctant officers with orders that cannot be evaded or disobeyed.[2]

But suppose it be a private corporation that is authorized to take private property, and is obliged to pay for it; can an individual be turned over for his compensation to the credit and solvency of this body? Can it be authorized to take, furnishing no other security than these? Or must it rather be obliged to make contemporaneous payment, or else provide what shall be tantamount to that?

It is certain that the purse of a private corporation is no infallible fund; it cannot be regarded so in theory, nor is it, by any means, found to be so in fact. Witness the energetic language that is found in the Reports on this head,[3] and the common observation and experience. Unless, then, such corporation be compelled to furnish contemporaneous payment or something equivalent, it would seem that the party whose property is taken has only a precarious and doubtful fund to rely on, and by no means that sure and reliable one which the constitutional guaranty, the duty of the State, and the rights of the citizen require; the provision of the constitution that assures to the citizen a just compensation, may be evaded or violated by indirection, and the citizen, instead of receiving a just compensation, may be turned over, with the mass of the creditors of an insolvent corporation, to a mere dividend, and perhaps only a nominal one, upon the value of the property taken.[2]

[1] *Bloodgood* v. *R. R. Co.*, 18 Wend. 9; *Symonds* v. *Cincinnati*, 14 Ohio, 185.

[2] *Bloodgood* v. *R. R. Co.*, 18 Wend. 9.

[3] *Symonds* v. *Cincinnati*, 14 Oh. 185, per Read, J

The legislature, therefore, cannot vest the title in the corporation before compensation made or its equivalent, although it may justify an entry and remaining in possession, (*e. g.*, in the case of a railroad corporation,) to the ends of the public work, until payment shall, in a reasonable time, be made. And since such an entry is only justifiable on the ground that the corporation intends to acquire the title, if it fails to pay in due time, it may well be held to have abandoned its intention of acquiring the title, and so to lose its justification.[1]

Beyond what has now been indicated, the constitutional provision in question cannot be held to control the legislative discretion. When compensation shall be made, in what form it shall be made, and how ascertained, are inquiries in which the judiciary have, in general, no part, unless some further provision may give it. These questions are left to the legislature, and are to be settled by that body alone, it would appear, upon those principles of universal application, which have been previously laid down.

VI. A brief consideration of certain peculiar provisions on this subject in the constitutions of the United States.

If the ground taken at the outset of our investigation be the true one, viz.: that the Right of Eminent Domain is an inherent right of sovereignty, and therefore the same in all States, and one to be interpreted upon principles applicable the whole world over,— then, of course, in all our American States, this right, so far as it remains unaffected by constitutional provisions, stands upon the general principles which govern the sovereignty in all other countries, and which it has been sought to set forth and maintain in the course of this essay.

All the American constitutions, however, may be said to have provisions that affect this right in some degree; since all provide that the sovereign power of legislation, which includes this Right, shall be vested in the legislature; and so in a body constantly changing, and bound by a perpetual obligation, to transmit the sovereignty to its successors intact. Thus all the American constitutions in declaring that the Right of Eminent Domain shall be vested in the legislature, provide, by necessary implication, that the legislature shall not impair or part with it.

A number of the State constitutions have no other provision than this, that can properly be held to apply to our subject.

A majority of them, however, and the Federal Constitution besides, contain a clause (substantially the same in all) that "private property shall not be taken for public purposes without just compensation." This has already been discussed under the fifth general head of our essay.

Some States have other provisions explaining or limiting the Right of Eminent Domain, as it exists in the hands of their legis-

[1] *Hawkins* v. *Lawrence*, 8 Blackf. 267; *McCormick* v. *Lafayette*, 1 Smith, (Ind) 83; *Cushman* v. *Smith*, 34 Maine, 247.

latures, which we will now very briefly indicate. Most of these, it will be noticed, serve only to enunciate, and put under the protection of the judiciary, some one or more of those principles already laid down and enforced in our pages.

The Constitution of Vermont[1] provides that the owner of property taken, "ought to receive an equivalent in money." That of Ohio[2] has a similar provision, requiring either money or a deposit of money.

That of New York[3] requires that when property is taken, the damages must be assessed by a jury, or by not less than three commissioners appointed by a court of record. It also authorizes the taking of lands for private roads, — the necessity of the road to be ascertained and the damages to be assessed, by a jury, and that amount, together with the expenses of the proceeding, to be paid by the person to be benefitted.

The Constitution of New Jersey[4] has the usual provision, to which it is added that "land may be taken as heretofore for public highways, until the legislature shall direct compensation to be made."

The Constitution of Pennsylvania[5] forbids the legislature to authorize any corporate body or individual to take private property for public use, without requiring compensation to be made, or adequate security to be given, before the taking. In this State, too, the fee in land may be taken for highways without compensation; this is not under any constitutional provision, but is explained on the ground that, when the soil of the State was originally sold, six per cent. was thrown in, free of charge, for the express purpose of highways.[6]

The Constitutions of Mississippi[7] and Kentucky[8] require compensation to be made before the property is taken. That of Ohio[9] has a similar provision, excepting only cases of necessity, demanding immediate seizure.

The Constitution of Ohio[9] also provides that benefits shall not be deducted in ascertaining compensation.

Those of Georgia[10] and Texas forbid the legislature to pass laws emancipating slaves, without the consent of each of the owners previously.

The Constitutions of Alabama[11] and Kentucky[12] forbid the

[1] Ch. 1, Art. 2, (1793.)
[2] Art. 1, s. 19, (1851.)
[3] Ibid. s. 7, (1846.)
[4] Ibid. s. 16, (1844.)
[5] Art. 7, s. 4, (1838.)
[6] *Com.* v. *Fisher*, 1 Pa. 466; *Case of P. & Tr. R. R. Co.*, 6 Whart. 44.
[7] Art. 1, s. 13, (1832.)
[8] Art. 10, s. 12, (1850.)
[9] Art. 1, s. 19, (1851.)
[10] Art. 4, s. 11, (1834.)
[11] Art. 6, Tit. *Slaves*, (1843.)
[12] Art. 10, s. 1, (1850.)

legislature to emancipate slaves without their owners' consent, or paying to the owners, previously to such emancipation, a full equivalent in money for the slaves so emancipated.

We have now referred to all the provisions relating to our subject, that occur in the United States constitutions. The clauses in them relating to trial by jury seem to be generally, if not universally, held inapplicable to proceedings under the Right of Eminent Domain.[1] And the same is true of that provision engrafted into a number of the State constitutions from Magna Charta, that "no freeman shall be deprived of his property, but by the judgment of his peers or by the law of the land."[2]

Of the constitutional provisions now rehearsed, it will be observed that only one, to wit, that in New York relative to private roads, can properly be regarded as at variance with the principles advocated in this essay. The provision in the Constitutions of Georgia and Texas, forbidding to emancipate slaves without their owners' consent, serves to restrict the power of the legislature. But those in Kentucky, Mississippi and Alabama, requiring compensation to be made before taking private property or emancipating slaves; those in Vermont and Ohio, requiring compensation in money; that in Ohio, forbidding the deduction of benefits; and that in Pennsylvania, forbidding to authorize corporations or other persons to take property without previous payment or adequate security, — these, in the view we have taken, are not so much limitations on the Right of Eminent Domain, as provisions intended to secure its due exercise.

And now, having indicated the sources of the Right of Eminent Domain, having defined and analyzed it, and treated of the various questions that have presented themselves under it, and, finally, having touched upon all those provisions in the United States constitutions that affect it, we shall end the present discussion of our subject.

[1] 2 Kent, 339, n. (b.); *Bonaparte* v. *R. R. Co.*, 1 Bald. 205.
[2] *Lindsay* v. *Com'rs*, 2 Bay, 38; *Taylor* v. *Porter*, 4 Hill, (N. Y.) 140.

RECENT LEGISLATION. — NEW HAMPSHIRE.

The New Hampshire legislature rose on the twelfth of last July, after a session of something less than six weeks, which is about the average duration of the annual legislative labors in that State. It has been usual to hold a second session in November of the year of the presidential election, "to establish a new proportion for the assessment of the public taxes," and in case of the failure to choose the presidential electors by a majority vote of the people, to choose them by the legislature. An act of a previous year, however, having provided for the choice of electors by a plurality vote, the recent legislature, with commendable regard to economy, accomplished, at their June session, the laborious task of establishing the apportionment of taxes, and obviated the necessity for reassembling in November, thus saving to the public treasury the expenditure of some fifty thousand dollars.

A great proportion of the session was consumed, as usual, in discussing and acting upon the various resolutions, and acts relating to towns and particular corporations, which possess no general interest. We propose, merely, to state the few acts of public importance, and indicate what seems to us to be their practical effect.

It may not be improper to state, that the legislature comprised many of the most eminent men in the State, (we do not allude in any wise to their political position,) and of considerable legislative experience, and we think the effect of their presence is observable in the substance and form of the laws.

An act in amendment of Chapter 1667 of the Pamphlet Laws, gives the same jurisdiction to the Supreme Court, in the administration of the naturalization laws, as was exercised by the Court of Common Pleas. It requires a naturalized citizen to present his naturalization papers to the proper authorities in the place where he wishes to vote, at least thirty days, instead of three months, as required by the amended act, before the election, unless his name had been previously on the check list, and he had voted there. As any person must have resided in a place three months before he can vote there, this requirement causes no inconvenience to the person wishing to vote, while it seems proper that the authorities should have

sufficient time to ascertain the legality and correctness of the papers, should they have been issued in a distant State, and be liable to suspicion from their appearance or the circumstances of the case.

Another political act repeals such clauses of Chapters 25 and 42 of the Compiled Statutes, as affect the political rights of students at literary institutions. By those clauses, students, residing in a place, merely for obtaining an education, were deprived of the rights of citizens residing there for other purposes. We know no reason why a student should not have the same political rights as a butcher, a mechanic, or a trader, who may have a residence equally temporary. By the repeal of the two clauses, such rights are restored to him.

The legislature of 1855 remodeled the whole judiciary system. It is not within our province now to discuss the propriety of so comprehensive a measure, or to criticize the method by which the change was accomplished.

Before last year there was so large and continually increasing an accumulation of causes in the Common Pleas Courts of the large counties, then having the trial of criminal cases, which always took precedence of all others, that they were entirely insufficient to satisfy the necessities of public business. To remedy this, terms of the Supreme Court were in 1855 established for the trial of criminal cases, and also having a limited concurrent civil jurisdiction, and the Courts of Common Pleas were thus relieved to a considerable extent; but instead of the remedy being limited to the few counties where it was needed, it was extended to all the counties in the State. A year's trial of the new system had shown that the two additional terms were unnecessarily expensive and troublesome in the small counties. The act was amended by the last legislature, so that the Criminal and Common Pleas terms are reunited in all the counties except those of Merrimack, Hillsboro', Strafford, and Rockingham.

By another act it is made the duty of the County Commissioners to attend, as long as may be necessary during the first week *only* of each term of the Court of Common Pleas. We suppose the object of this law is to remove the temptation which $3 *per diem* may offer to the commissioners to prolong their biannual labors beyond the seven days, which are thought sufficient for their accomplishment.

Another clause, of the same act, limits the attendance

fees of parties in actions to twelve days, except at the term at which the actions shall be tried by a jury. This law is perhaps the most important one which affects litigation. The aggregate amount of these fees, saved to litigants, is, in some counties, several thousand dollars in each term. We cannot say how cordially the profession approve this reform.

An act relating to corporations, restricts the private liability of stockholders to debts incurred before the whole of the capital stock of the corporation shall have been paid in, and such fact properly certified and recorded. This law is to render clear and certain some ambiguity of expression in the act which it amends.

It is enacted, that no shareholder, in a corporation, shall vote by proxy on more than such a number of shares as he represents, and together with all shares he may personally vote on the amount of five thousand dollars in par value of the capital stock. This is an excellent law, and corrects, in a measure, a growing evil. It has been the practice, lately, of some of those interested in carrying any measure in a corporation, to send their agents to the different stockholders to obtain their proxies, so that a contest regarding the policy or propriety of a proposed measure, was not as to what was right or politic, but as to who shall succeed in obtaining the most proxies. It may be said that men have a right to determine their vote before the meeting is held, and to authorize another to declare it for them. But we think not; new facts and arguments, which they have not heard, may be presented at a meeting, called for the very purpose of full and fair discussion. But one cannot present new facts to proxies; one cannot reason with proxies; and as they are generally held by those most interested personally in the result, proxies often carry the day against policy and right. They who have sufficient regard for the common interests to attend the business meetings, have a right to require that the management of the affairs shall be left to their judgment upon the information and exchange of views which may thus be afforded. We do not see why the principle should not be extended so far as to prohibit all proxy voting.

An act, requiring the construction of a run-way for fish, at all dams or other artificial obstructions, on the Connecticut and Merrimack rivers, was referred to a committee to report to the next legislature.

The Judiciary Committee reported a bill to enable par-

ties to actions to testify, but it was rejected by the House; perhaps it will be well to await the result of the experiment in Massachusetts, where such a law is now in force.

We do not think it necessary to specify any other acts. Although the legislature showed such regard for strict and sometimes close economy, in its general legislation, it has opened the State's purse wide in generous sympathy for the insane, and for those youthful offenders against the laws, whom it delights to reclaim and to rear up as good citizens. Appropriations were made for the Insane Ayslum, which, always receiving support and favor, has now its doors thrown open for the indigent, who could never before profit by its beneficence; and, also, for a State Reform School, which is established for the confinement and instruction of youth, who have hitherto been imprisoned with old and hardened criminals.

Superior Court of Cincinnati. General Term. November, 1855.

Before Justices SPENCER, GHOLSON, and STORER.*

MATILDA CAMPBELL, Administratrix of Robert Campbell, deceased, Plaintiff in Error *v.* PATRICK ROGERS et al.

An action cannot be maintained by the administrator, or other personal representative of a deceased party, under the Statute of March 25, 1851, requiring compensation for causing death by *wrongful act, neglect*, or *default*, when the act causing the death occurred without the State, and the deceased was not a resident of the State.

ROBERT CAMPBELL, the plaintiff's intestate, while employed by the defendants as engineer on board the steamboat "Fort Henry," was drowned in the Ohio River, in October 1854. When the accident occurred, the boat was navigating the river without the jurisdiction of the State of Ohio; and the deceased fell overboard while on duty. It is charged in the petition that he lost his life by the negligent conduct of the officers and crew of the steamboat, who in their efforts to save him were not only careless, but by their want of skill in the management of the vessel, caused one of its wheels to strike the deceased, while struggling in the water, and thereby produced his death. It is also stated the boat was not provided with suitable yawls or other

* From 2 Handy, R.

small boats, as required by the Act of Congress, passed August 30th, 1852, entitled "An Act to amend an Act to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam, and for other purposes." In consequence of this omission, it is also stated, the usual means to save persons from drowning could not be applied.

The plaintiff, who is the widow of the deceased, obtained letters of administration upon her husband's estate, from the Probate Court of Campbell County, Kentucky, where he resided; and now brings her action against the defendant, to recover damage for the loss of her husband, under the law of Ohio, passed March 25th, 1851, requiring "compensation for causing death by wrongful act, neglect or default." The Statute is as follows: —

An act requiring compensation for causing death by wrongful act, neglect or default.

Sec. 1. — Be it enacted by the General Assembly of the State of Ohio, that whenever the death of a person shall be caused by the wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action, and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances, as amount in law to murder in the first or second degree or manslaughter.

Sec. 2. — Every such action shall be brought by and in the name of the personal representatives of such deceased person: and the amount recovered in every such action, shall be for the exclusive benefit of the widow and next of kin, in the proportions provided by law in relation to the distribution of personal estates, left by persons dying intestate: and in every such case the jury may give such damages as they shall deem fair and just, not exceeding five thousand dollars, with reference to the pecuniary injury resulting from such death to the wife, and next of kin to such deceased. *Provided*, that every such action shall be commenced within two years, after the death of such deceased person.

On the trial of the case before Judge Gholson, at Special Term, the Court gave the following among other charges to the Jury: "That if they should believe from the evidence, the injury resulting in the death of the intestate was inflicted or happened without the State of Ohio, and that the intestate did not reside, or have his domicil or usual place of residence in Ohio, then no action could be brought under the statute of 1851; and independent of that statute, no action could be brought for an injury

resulting in the death of the intestate, by his personal representative."

The plaintiff's counsel excepted to this charge, and now seeks to reverse the judgment of the Court in Special Term.

STORER, J., delivered the opinion of the Court.

The law, as affirmed by the Judge in his charge to the jury, presents the only question for our decision. It lies at the threshold of the case, and our judgment upon it must dispose of the controversy between the parties.

We have already held in *Worley* v. *The Cin. Ham. & Dayton R. R. Co.*, 1 Handy, 481, that an action will not lie at common law by the representative of a deceased person to recover damages for his death, and our opinion is unchanged. We have found no American authority to the contrary since our decision was made, but believe the course of decision in all the States is in harmony with our own. In England the law has been so universally admitted, that we need not again refer to the cases where it has been adjudicated. We may be permitted, however, to quote the language of Mr. Smith, in his notes to *Ashby* v. *White et al.*, 2 Leading Cases, 131: "Before the recent act of Parliament, 9 and 10 Vict., Ch. 93, for compensating the families of persons killed by accidents, no action at law was maintainable against a person, who by his wrongful act, neglect or default, caused the death of another, though under circumstances which would have given the sufferer a right of action, had he survived; and the husband, wife, parent, or children of the deceased were without remedy against the wrongdoer, by whom they had been deprived of comfort and support."

It is sought, however, very ingeniously, to maintain this action, and to claim the benefit of the statute, on the ground that the wife always had by the law of nature a right to indemnity for the loss of her husband, and whenever a remedy is provided, as it is contended has been furnished by the statute, the right then existing will be thereby upheld and enforced.

The proposition thus asserted involves another, that if admitted, the remedy may be claimed within any jurisdiction where the wrongdoer can be served with process; and the result must necessarily be, that it is immaterial where the act took place, which caused the decedent's death. In such a case the venue would be transitory, and the judicial

tribunals of any State or country may take cognizance of the complaint.

A very able exposition of what are urged to be our natural rights has been submitted by counsel, and the various relations we sustain to our race very skilfully examined and discussed; but sitting as a Court of Law, established by law, and deriving our power to adjudicate wholly from the law, however instructive and curious are the distinctions made in the argument, we cannot appreciate their application, nor admit their soundness; nor can we regard the maxim *ubi jus, ibi remedium*, urged upon us with so much zeal, as a license on our part to disregard established rules to create a new remedy, and certainly not to provide a new right of action.

When we become members of any civil or political organization, we look alone to the government under which we live to provide the means of protection for our persons and property. If these means prove inadequate, the law-making power must be invoked, to furnish a sufficient remedy, and if necessary, confer a right that did not exist before. It never could be permitted that the party aggrieved might assume a right to exist, and provide also a remedy to enforce it; such an admission would take from the legislature the power to enact the law, and from the courts the authority to expound it.

There always have been, and ever must be, in the imperfect administration of human law, many cases of hardship, indeed of great suffering, where no relief can be given by the courts, and these cases will continue to occur while the business of the world is subject to so many changes, and is conducted by such a diversity of instruments. *Damnum absque injuria*, are, in legal parlance, household words, recognized as a settled rule of judicial action, which must determine all questions to which it properly applies, however apparently unjust may seem its application.

Instances might be multiplied, in which wrongs the most grievous are without legal redress. Thus the seduction of a daughter, not in her father's service, actual or constructive, furnishes no right of action to the parent, and the injured party herself is without remedy. However erroneous may be the opinion of the Judge who decides a legal controversy; however unfit he may be to hold a seat on the bench; however ruinous to the fortunes of suitors may be his judgments, he is yet protected by the same law he has not the capacity to expound; unless he has mingled malice

with his ignorance, he enjoys perfect indemnity. And so the owner of land, while excavating the soil, though immediately adjoining his neighbor's property, if he is guilty of no wanton or careless act, cannot be held to answer in damages, though the consequence of the excavation may be the falling of an adjacent building. His act may have produced the injury, but it was his privilege to occupy and improve his own estate, and only when he shall have abused the right, can he be made responsible.

Perhaps a more familiar, and yet striking illustration of the maxim, may be found in the rule, that compels the creditor of the general government, or of a State, to ask as a favor what he certainly should be permitted to demand as a right. The slow and uncertain remedy by petition to the legislature is the only mode of relief, and too often when it is sought, the simplest justice is either postponed, or utterly denied. It cannot then be predicated, from the assumption of the existence of a natural right, that it necessarily follows there is always a remedy.

The case of *Ashby* v. *White et al.*, Ld. Raym. 938, is generally cited to exemplify the rule, that where there is a right, there is a remedy; but it was not contended by the counsel then, nor held by the court, when it was heard and decided in the King's Bench, nor when it was finally determined in the House of Lords, 1 Bro. Parl. Cas. 48, that there was any other than legal rights, of which the judicial tribunals could take cognizance.

In *Paisly* v. *Freeman*, 3 T. R. 45, the Judge lays down the rule, "that where cases are new in their principle, it is necesary to have recourse to legislative interposition to remedy the grievance; but where the case is only new in the instance, and the only question is upon the application of a principle recognized in the law to such new case, it will be just as competent for the courts to apply the principle to any case that may arise two centuries hence, as it was two centuries ago."

The same ruling is found in *Russell* v. *The Men of Devon*, 2 T. R. 667. It was there held that no foundation existed, upon which the action could be supported, and if it had been intended, the legislature would have interfered and given a remedy. And Lord Kenyon, in referring to the Statute of Winton, to illustrate the principle decided, remarked, "that the reason of the statute was, as the hundred are bound to keep watch and ward, it was supposed that those irregularities which led to robbery, must have

happened by their neglect; but it never was imagined that the hundred could have been compelled to make satisfaction, until the statute giving the remedy was passed; and undoubtedly no action could be maintained before that time."

In *Le Caux* v. *Eden*, 2 Doug. 601, where an action of trespass was brought, for taking a vessel at sea as a prize, upon the question being made, whether such an action would lie, it was determined that "inasmuch as there never had been an action brought in such a case, a case that must have frequently occurred if such an action would lie, that circumstance went strongly to show the general opinion of the profession to be, that no such action would lie." The same argument is very elaborately urged by Dallas, Ch. J., in deciding the case of the *Duke of New Castle* v. *Clarke*, 8 Taunt. 620; and by Beardsley, J., in *Costigan* v. *The Mohawk & Hud. Railroad*, 2 Denio, 609.

From the examination of the cases we have quoted, as upon general principles, we must conclude, that where there is no clearly defined legal right, there can be no remedy; and where a right not before existing is created by statute, and a remedy given, the right can alone be asserted in the mode authorized by the statute. The common law, nor the law of nature, cannot be appealed to to sustain the right or aid the remedy; *Miller* v. *Taylor*, 4 Burr. 2320; *City of Boston* v. *Shaw*, 1 Met. 138; *Moncrief* v. *Ely*, 17 Wend. 405.

The statute upon which this suit is brought is in derogation of the common law, and the practice of the courts, in that it confers upon the personal representative a right hitherto unknown. Had the decedent when living commenced his action for a personal injury, it would have abated by his death, and of course there would be no survivorship to the heir or administrator; and it never has been supposed that damages for torts to the person, not yet reduced to a judgment, were *bona notabilia* to give jurisdiction to the Court of Probate, or a fund for the benefit of creditors. Yet the legislature have practically declared that the action survives, and damages may be recovered, though the injured party has deceased. The remedy is not given to the wife, the child, or any near relative, but conferred upon the personal representative alone, who is thereby invested with a new character. He is no longer the administrator merely of the decedent's estate, to collect and distribute the assets, but is made the

trustee of others, who alone are interested in the new relation he sustains. His duties are changed, for he cannot be controlled by the general law prescribing his conduct, nor held responsible for the execution of his trust, by the Court of Probate. The introduction of a principle so anomalous, we cannot but think, not only gives an extraordinary remedy, but clearly creates a new right of action.

We are thus brought to the only remaining question: Can a foreign administrator, for the death of a non-resident intestate, and where the act producing it occurred without the State, be allowed the benefit of the statute?

By the § 236 of the law of 1840, foreign executors and administrators are permitted to sue in our courts, and thus enjoy a privilege that would otherwise depend upon comity only. When they seek the aid of our tribunals to enforce foreign contracts, no relief will be granted, if the courts where the cause of action first arose would not have upheld them; if the agreement was void by the *lex loci*, it will not be enforced by the *lex fori;* and so if there is no right to recover for an alleged injury in the State where it is said to have been committed, there can be none in any other State. It cannot be argued that the character of the act producing the injury, excepts the case from the general principle; but on the contrary, every claim that is attempted to be asserted in Ohio, which had its origin in Kentucky, must have been authorized by her laws. If they do not recognize its existence, it has no legal vitality here.

The record before us establishes the fact, that the decedent came to his death on the Ohio River, between the States of Kentucky and Indiana; and if the right of action then accrued, it must have been permitted by the laws of one or the other of these States, as the jurisdiction of both was mutual and co-ordinate over the subject.

In neither of those States could the wife or children of the decedent have sued at common law, for the loss of the husband, or the father. The Court of Appeals of Kentucky so decided, in *Eden* v. *Lexington & Frankfort Railroad Company*, 12 B. Mun. 204, and we understand the same doctrine is held in Indiana; and in neither State was there a statute like ours conferring a right of action upon the personal representative.

Would it then be just to the courts of these States, or to our own citizens, to extend the provisions of our statute to those for whom it was not enacted, and whose claims it was never intended to embrace? We believe the statute

was passed to protect those within our own jurisdiction, and who were thus subject to our laws; not to include torts committed in other States. Any other construction might apply the very stringent penalties of the "Act of 1854, to provide against the evils resulting from the sale of intoxicating liquors," to every State in the Union, and permit the results of intoxication in Maine or California to be measured by a rule that did not exist where the drunkenness was occasioned. The person who may have caused the injury, need only be found in Ohio, and the retribution of our statute will be visited upon him. Such we cannot believe is the law.

We cannot take notice of the criminal codes of our sister States, nor enforce the penalties they impose, nor can our courts punish an offence committed without our jurisdiction, and so far has this rule been extended, that in *Indiana* v. *Johns et al.*, 5 Ohio 217, it was held that a suit could not be maintained upon a penal bond given in another State, where its breach subjected the obligor to a statutory penalty. See also, *The Antelope*, 10 Wheat. 66–223; *Scoville* v. *Canfield*, 14 Johns. 338–340; *Folliott* v. *Ogden*, 1 H. Black. 135.

When the legislature of Mississippi, a few years since, declared that the survivor, in a duel, should be compelled to support the family of his victim, it never was supposed the law was extra territorial, and we have yet to learn, the survivor in any fatal recontre, in the States contiguous, was held amenable to the penalty, should he afterwards have become a resident of Mississippi.

This example presents perhaps an extreme case, but it clearly proves, we think, the general rule, that no such action could be maintained.

We have already stated, that the plaintiff could not maintain an action like the present, in either of the States having jurisdiction over the offence complained of, at the time it was committed. No such right as that now asserted existed there; but by the law of Ohio, the personal representative is made the trustee of the decedent's kindred, among whom the damages, when recovered, are to be distributed; and it necessarily follows, the foreign administrator, if allowed to sue in Ohio, must be subject to the same rule; and yet it is difficult to understand, how the plaintiff, who derives all her power from the Probate Court in Kentucky, and is accountable only to the tribunal where she has given her bond, can claim a new character, and

assume new relations in Ohio. The damages in the event of a recovery would be assets in her hands, to be distributed, as required by the law of the domicil, not of the forum. No trust exists by virtue of any statute of Kentucky, and we cannot perceive how those, who would be entitled by the law of Ohio to participate in the fund, could compel a distribution. The law of descents here is the rule presented, and yet it would be a novel doctrine, if the heirs of the decedent could take their share of his personal estate, by any other rule than that which prevails in Kentucky.

We have examined the question before us in all its phases, with an anxious desire to ascertain the true rule of decision, in a case that is at once novel and interesting. Our researches have thoroughly convinced us that the plaintiff has no right to maintain the action, and the Judge, in so affirming the law, committed no error. We hold the statute of 1851 has no extra territorial jurisdiction; that it was intended to operate only in this State; that it created a new right of action, and furnished a new remedy, neither of which can be extended to the present case.

The principle upon which we decide the question, has been recognized by the Supreme Court, in the construction they have given to the law of 1840, "authorizing the collection of claims against steamboats." In *Champion* v. *Janitzen*, 16 Ohio, 91; *Goodsell* v. *St. Louis*, ib. 178, it was *held*, that no extra territorial jurisdiction could be claimed under the statute; its provisions were intended to operate, and could only operate within the State, or the waters bordering on the State. And we but affirm the same rule, when we apply it to the present action.

The judgment at Special Term is affirmed.

Ketchum, and *Headington*, for plaintiff.

Lincoln, *Smith*, and *Warnock*, for defendant.

Notes of Recent Cases in New Hampshire.*

July Term, 1856. *Grafton.*

BELL *v.* WOODWARD.

Rights of holders of mortgages by assignment — Merger.

If the owner of an equity of redemption subject to two mortgages made by a former owner, purchase and take an assignment of the prior mortgage, that mortgage is not extinguished, but will be upheld as an existing security in the hands of the assignee.

The owner of such mortgage and equity of redemption may convey them, and the mortgage will not be extinguished by the conveyance.

If the owner of such mortgage and equity of redemption convey the land by quitclaim deed, and at the same time deliver over to the purchaser the mortgage deed and note, this will convey the mortgage and mortgage debt as well as the equity of redemption.

Mary Hale purchased an equity of redemption subject to two mortgages, and bought in the prior mortgage: she gave a quitclaim deed of the land to the defendant, and delivered over to him the mortgage deed and note; the note had not been paid, but when produced on trial had written across the face, "cancelled by Mary Hale." There was no evidence to show when, or by what bargain, if any, or for what purpose the writing was put on the note.

Held, that the intention of the parties must be presumed to have been to keep the mortgage on foot; that this intention was consistent with equity; and would be carried into effect against the subsequent mortgagee.

WEBBER *v.* MERRILL.

Damages recoverable by one tenant in common — Verdict received on Sunday.

If one tenant in common, sue alone in trespass *qu. cl.*, and the defendant, instead of pleading the nonjoinder of the other tenants in common, plead to the action, the plaintiff will recover for his share of the damage.

A verdict may be lawfully returned on Sunday, if the cause was committed to the jury before that day.

PUTNAM *v.* MELLEN.

Exchange of chattels — Independent agreements.

On the 27th of December the plaintiff and defendant agreed to exchange oxen. The defendant was to drive his to one Willey's,

* Continued from page 294.

where the plaintiff's cattle were, on the next morning, and the exchange was then and there to be made. The plaintiff was to give the defendant $20 as boot; three dollars of which were paid on the 27th as earnest of the bargain, and the remaining seventeen were to be paid on the 15th of January following.

On the 28th of December, Willey, who had the care of the plaintiff's cattle, and who was to make the exchange for the plaintiff, having waited till after eight o'clock, took the oxen and went to get a load of laths for himself. Returning between ten and eleven o'clock that forenoon, he saw the defendant in his door-yard, and they met about twenty-five or thirty rods from the house. Willey asked the defendant if he had come to exchange, and he said he had. Willey proposed to do it then, but defendant said he had a log on his sled that was rather heavy, and plaintiff's cattle were a little worried, and he would exchange when he came back.

Held, that the agreements to make the exchange and to pay the money at a future day were independent undertakings; and that an action could be maintained for a refusal to make the exchange on the 28th, without showing a payment of the $17. *Held also*, that the plaintiff was not bound to leave the $17, or security for the same with Willey on the 28th, to be delivered before the exchange. *Held further*, that there was a substantial performance by the plaintiff, on the 28th, of his part of the contract to be performed on that day.

Cross *v.* Bell.

Presumptive evidence — Usury recoverable.

The plaintiff brought his action for $200 alleged to have been paid as usury. It appeared that he had agreed to pay the defendant $1800 for a third person; that the defendant wrote notes for $2000, and upon the plaintiff's objecting that they were too large, the defendant replied, "There is our account and other deal — all is put in." The plaintiff signed the notes, and afterwards paid them.

At the trial the plaintiff notified the defendant to produce his books of account; but it was not done; and the court instructed the jury that they might infer from the fact that the books were not produced, that they would not aid the defence if produced, — *Held*, that the instructions might be sustained.

Illegal interest may be recovered back in an action for money had and received, and no special demand is necessary before suit brought.

BEAN *v.* BRACKETT.

Petition under the statute to redeem a mortgage — Sale by assignee in bankruptcy — Notice of sale proved by assignee.

In a petition to redeem a mortgage, filed in the common pleas under the Revised Statutes: *Held*, if a debtor agree with a third person to buy a lot of land, and give his notes and a mortgage for the price, and then to give to the debtor a bond to convey to him the same land on payment of notes of the like amount and date, and the object of the arrangement is to keep the debtor's property out of the reach of his creditors, and the debtor goes into possession and erects buildings on the land, the transaction cannot be impeached for fraud, because there is no transfer of the debtor's property to defeat or delay creditors; and because by our statute the debtor's right under the bond remains open to attachment, as if he held the legal estate.

Held also, that the debtor has an equitable estate in the land, and any buildings he erects upon it become a part of the realty, subject to the mortgage to the original owner. They are not to be regarded as personal property. If they are mortgaged by the debtor, his mortgage should be recorded in the county records as a deed of real estate, and if he describes the premises mortgaged as buildings, the description will pass the land on which they stand.

Held further, that if the debtor becomes bankrupt, and his schedule describes his interest in the land as subject to a mortgage on the buildings, and the assignee by license of the District Court, sells the estate as it is described in the schedule, the purchaser cannot take advantage of the fact, that the mortgage was made for the purpose of giving a fraudulent preference, though the assignee might have avoided the mortgage, or have sold it as being free of such mortgage. The power to avoid such mortgage is to be exercised for the benefit of the estate, and not of a particular purchaser at the sale.

If the purchasers at the assignee's sale, having previously taken an assignment of the original mortgage, and recovered possession of the land and buildings by a suit, have taken the rents and profits until they exceed the amount due upon the mortgage, and nothing appears to change the ordinary rule that the purchasers of land subject to a mortgage are to contribute proportionably, the whole is to be applied in discharge of the mortgage; and it is consequently to be decreed to have been fully paid and discharged.

The testimony of the assignee in bankruptcy is competent evidence to prove the posting of the notices of the sale and their contents, it appearing that he had no knowledge where they were, or what became of them.

Goulding v. Clarke.

Proprietary records — Proceedings in calling proprietary meetings.

A warrant under the Revised Statutes, issued by a justice to call a proprietary meeting, must be issued upon application of the owner or owners of one twentieth of the corporate property, and must be published fourteen days, as provided for warning the annual meeting of said corporation.

That a meeting was called in 1815, upon a petition which set forth that the petitioner was owner of one sixteenth part of the property, is not sufficient evidence against a stranger, that he was such owner, so as to prove that his children were owners of the same interest.

The votes of the proprietary required notice in a newspaper printed at Hanover, if any, otherwise in one printed at Concord: the Justice ordered notice in a paper printed at Concord; it was *held* insufficient without proof that no paper was printed at Hanover, and it must be shown that notice was published as ordered.

By the statute of 1846, the petition to the Justice must be signed by three or more proprietors; one signed by two only is insufficient to support the subsequent proceedings. The statute requires notice to be published in a paper in the county, where a majority of such proprietors reside. *Held*, a publication in another county is insufficient, without evidence as to the residence of the proprietors.

If *primâ facie* evidence is produced that the books offered are the records of the proprietary, and the entries, if recent, purport to be made by a person, who was acting clerk, claiming to be such by virtue of an election, this is sufficient to authorize the court to examine into the regularity of the proceedings, and to admit them as evidence, if no sufficient objection appears to exclude them.

Cummings v. Allen.

Second allowance to widow.

On appeal from a decree of the Judge of Probate making a second allowance to a widow. *Held*, that though a Court of Probate may make an allowance to a widow without notice, in the exercise of its discretion, yet the discretion to be exercised is a legal and not a capricious discretion; and where one allowance deemed at the time suitable and sufficient has been made, it is not a just exercise of such discretion to make a further allowance without notice. On appeal in such case, the Supreme Court examine the question as to the amount of allowance, as if the case were originally before them. Where the debts exceeded the whole estate, which was about $6,400, and the widow's dower was worth $640, and she was allowed $600, a further allowance was not deemed reasonable.

WHITE MOUNTAINS RAILROAD COMPANY *v.* EASTMAN, ADM'R.

Assessments on railroad shares — Fraudulent subscription to railroad stock — Stockholders as witnesses.

That a witness may be made liable for the debts of a corporation on account of his having been a stockholder therein, under the statute of this State giving a remedy to the creditors of the corporation in certain cases specified, and upon particular proceedings presented for the recovery of their debts, against the stockholders personally, is no ground for excluding the witness from testifying for the corporation.

The records made by the clerk of a railroad corporation of the proceedings of the directors in ordering assessments upon the shares of the capital stock, may be used as evidence by the corporation in a suit brought by them to recover the assessments upon shares subscribed for by the defendant, he being one of the original grantees in the charter, and a director at the times of ordering the assessments, and having exercised the privileges of a stockholder from the time of his subscription, by virtue of the shares so subscribed for.

The intestate subscribed for thirty shares in the capital stock of the plaintiff corporation, agreeing to pay by the terms of the subscription, to the treasurer, the assessments which might be made upon the shares as ordered by the directors. At the time of the subscription, the clerk of the corporation, by order of the directors, signed and delivered to the intestate a writing as follows:

"In consideration that Ebenezer Eastman (the intestate) will subscribe for 30 shares in the White Mountains Railroad, said corporation agree to release him from twenty-five of said shares or such portion of said twenty-five shares, as he may within one year elect to withdraw from his subscription, and if he has been assessed and has paid anything on those shares, that he elects to be released from, that those payments shall be allowed him on the shares that he retains, and that the treasurer shall regulate his stock accounts and assessments accordingly."

It was understood between the directors and the intestate that the subscription was to be held out to the public as a *bonâ fide* subscription for the thirty shares, and no public disclosure was to be made of the fact that such writing had been given to the intestate.

Held, that the agreement to release the intestate from any of the shares subscribed for, was a fraud upon other subscribers, and void. And that the intestate was liable for the assessments on the thirty shares.

DICKEY *v.* LIVERMORE.

Scire facias against surety on appeal taken from a justice judgment.

It is no answer to a *scire facias* upon the recognizance entered into by the appellant to the adverse party upon an appeal from the

judgment of a justice of the peace in a civil cause, that the recognizance was taken with one surety only, it appearing that the parties agreed that it should be so taken.

Nor is it any ground of defence to such *scire facias* that after the appeal was entered in the Court of Common Pleas the parties made an agreement in writing to refer the action, and have it dismissed from the docket of the court; it appearing that the agreement was not filed with the clerk until after two continuances of the cause in that court, and a trial by the jury and verdict returned, subsequent to the making of the agreement.

July Term, 1856. *Coos.*

WALKER *v.* KENNISON.

Change of bail — Affidavits of jurors.

The defendant was held to bail. On the trial he moved the court to change the bail, so that the person originally taken might be a witness. The plaintiff made no objection to the responsibility of the new bail offered, but the court ruled that it was not within their discretion to grant the motion. *Held*, that the ruling was wrong.

Affidavits of jurors are not admissible to show the consultations that took place in a jury-room; or the motives, inducements, or principles upon which a jury founded or joined in a verdict.

The formation of a jury that is to try a cause is under the direction and within the discretion of the presiding judge.

HILLIARD *v.* GOOLD.

Tariff of fares on railroads — Conductors — Excessive use of authority a question for the jury.

Where tariffs of fares of freights and passengers upon a railroad are established and posted up by the president of the corporation, and the fares taken upon such tariffs are received and appropriated by the corporation without objection, the legal presumption is, that the president acted by the authority of the corporation in thus establishing and posting such tariffs.

The statute requiring conductors on railroads in this State to remove from the cars passengers refusing to pay the established fares, was intended to apply to all persons properly acting as conductors without regard to the formal regularity of their appointment, or the source from whence they derive compensation for their services.

A uniform discrimination in the tariff of fares for passengers, of five cents in favor of those who purchase tickets before entering the cars, over those who pay after taking their seats, is reasonable and legal.

Whenever the justification of an act alleged to be wrongful and injurious, is founded on the exercise of authority, whether that authority be incident to the official character and duty of the party exercising it, or arise from the misconduct of the opposite party and the necessities of the case, the question of the excess of such authority is to be determined by the jury upon the evidence submitted for their consideration, and not by the court.

Blake *v.* Rich.

Lands taken for railroads — Rights of owners.

The fee in land taken for the purpose of constructing a railroad under the laws of this State, remains in the owner of the soil from whom the land is taken, subject to the easement of the corporation as leased to them by the State.

The exclusive right of property in the land, in the trees and herbage upon its surface, and the minerals below it, remains unchanged, subject always to the right of the corporation to construct and operate a railroad over and through it, as authorized by law.

Berlin *v.* Gorham.

Power of legislature over public corporations — Supplies furnished paupers — Settlement of paupers.

The legislature has entire control over public corporations, to create, change, or destroy them at pleasure; and they are absolutely created by the act of incorporation itself, without the acceptance of the people, or any act on their part; unless otherwise provided by the act itself. A person who is a resident of the territory incorporated as a town at the time of its corporation, gains a settlement, though no meeting of the town is held before his removal.

A notice signed by selectmen as such, of support furnished to a pauper, is sufficient without saying *overseers of the poor*, if the overseers were chosen, and there will be no variance, though the declaration allege the notice to be signed by the selectmen and overseers of the poor.

Supplies furnished for the support of those who nurse a sick pauper may be properly regarded as supplies for the support of the pauper.

If charges for supplies to a pauper are intentionally excessive, they will be disallowed wholly; otherwise, if made too large by mistake.

If a person is taxed in a town seven years in succession, and does not pay the taxes of each year, he does not gain a settlement, though the tax unpaid is illegal. If the illegal tax is void, there is a failure to be taxed; if only voidable, a failure to pay; though if a part of a tax is legal, it is enough to pay that part.

Russell *v.* Fabyan.

Liability of tenant at sufferance for damage done to the premises — Redemption of real estate after levy.

Fabyan held under a written lease from the plaintiff, until it expired, certain premises, and still continued to occupy after the expiration. *Held*, that after his lease expired he was a tenant at sufferance; that until the landlord entered upon him, he was not liable to an action of trespass; that in other respects he was answerable for any damages growing out of his interference with the property, as a disseizer would be, who is responsible for any damage occasioned by his conduct, whether wilful or negligent; that an action on the case is the proper remedy for any such injury; and the tenant at sufferance having taken a lease and bond of indemnity from a third person, the latter was liable with him in a joint action.

Where the land of a debtor is set off on execution, he has a right of redemption, which may be taken and sold, subject to a like right of redemption, and so on successively. If the debtor has conveyed the property before any levy, by a deed voidable as to creditors, the guarantee has still an interest entitling him to redeem any of these levies. An offer to prove the deed of the plaintiff to be fraudulent as to creditors, made by a purchaser on a second levy, was proper, and the evidence should have been received.

Miles *v.* Roberts.

What witness understood — Contract for specific articles — Delivery — New contract.

A witness may testify what he understood from the conversation of the parties.

A contract was made for a payment to be made in grain, on a day, but with no designation of a place of delivery; the parties may subsequently agree on a place by which they will be bound; though parol evidence is not admissible to prove an original agreement not put in writing. Where there was shown a subsequent agreement to fix the place of delivery, the court are not called upon to state to the jury, where the place of payment would be by the original contract.

If a place was agreed upon and the defendant had then the grain ready to be delivered, and the plaintiff was there, saw it and declared himself satisfied with its quantity and quality, it would be evidence of an acceptance and discharge of the contract.

If a legal tender was made at the time and place of delivery agreed on, that would discharge the contract. An agreement of the defendant on a new consideration to carry the grain to another place and deliver it there, is not a waiver of the previous payment.

The plaintiff cannot avail himself of such new contract as a cause of action, in a declaration on the original contract alone.

HOVEY *v.* BARTLETT.

Equity of redemption — Extent.

The interest in land mortgaged, of the mortgagor in possession, will pass by the extent thereon of an execution against him upon an appraisal of the land at its full value, irrespective of the mortgage.

PERKINS *v.* PITMAN

Attachment by deputy sheriff — Liability of sheriff.

A deputy sheriff to whom a writ of attachment is delivered, with instructions to attach thereon a specific chattel, cannot avoid liability for neglecting to make the attachment, upon the ground that no indemnity was furnished to him against the liability which he might incur by making it, or that his fees for the service were not paid or tendered to him; unless at the time of receiving the instructions, or subsequently upon ascertaining the true situation of the property, he gave notice to the party requesting the attachment, that he objected to proceeding for those reasons.

A writing signed by the deputy sheriff and returned with the writ, by which the deputy agreed with the party plaintiff to be accountable when judgment was recovered, would not subject the sheriff to official accountability, and would, therefore, not be equivalent to a return of an attachment.

In case judgment should be recovered by the party plaintiff in such suit, the measure of damages in an action brought by him against the sheriff or his deputy for the neglect, would be the whole amount of the judgment, or so much thereof as the value of the property which the deputy neglected to attach would have been sufficient to satisfy.

The deputy, who has thus become liable for his neglect, cannot be a witness for the party defendant in that suit.

June Term, 1856. *Strafford.*

BUSBY *v.* LITTLEFIELD.

Answers in equity, how far evidence for defendants — Mistake in conveyance of land.

It is a general rule in equity, that, when a replication is put in to an answer, and the parties proceed to a hearing, all the allegations of the answer which are responsive to the bill, will be taken as true, unless they are disproved by two witnesses, or by one witness with corroborating circumstances.

When, however, the answer sets up affirmative allegations in opposition to, or in avoidance of the plaintiff's demand, the answer is no proof of the facts stated, and the defendant is bound to establish them by independent testimony.

Where a plaintiff filed his bill to reform a deed given by him, alleging that by the deed one hundred feet were conveyed on a certain street, whereas it should have conveyed thirty feet only, and the defendant in his answer admitted that there was a mistake in the deed, but *affirmed* that the deed should have been for thirty-two feet — it would seem that the defendant would be bound to establish his allegation by independent evidence.

Equity will reform a mistake made in drawing a deed; and may order a party holding land by a conveyance covering by mistake more than was purchased or intended to be conveyed, to release all claim to that which is unjustly held.

Bartlett v. Hoyt.

Depositions used on former trial — Objections to caption — Statements of adverse party — Conversion in trover.

Objections of a formal character to a deposition which has been used at a former trial without objection, are to be considered as waived.

Upon the second trial a deposition will not be rejected for want or defect of the caption, when it appears that the party objecting attended at the taking, and made no objection to its use at the former trial.

It is not necessary to be set forth in the caption that the taking *commenced* at the hour designated in the notice. It is sufficient if it be certified that it was *taken* at that hour.

It is no ground of objection to the use of a deposition at the second trial that it was filed with the clerk prior to the first, was withdrawn from the files at that trial, not then used, and has never been restored to the files.

When a statement of the adverse party is offered in evidence, and objected to on the ground that it was an offer or proposition for the settlement of a controversy, the preliminary question whether the statement was intended by the party making it as an admission of a fact, and not merely an offer to compromise, may be determined by the court, or in their discretion it may be submitted to the jury, with proper instructions to disregard it, if they find it to have been merely such offer or proposition, and to weigh it as evidence, if intended as such admission.

The plaintiff's hay in the freight-house of a railroad company, in charge of a servant employed to attend to the receipt and delivery of goods there, was taken, through the mistake of the servant, by him and the defendant from the freight-house, and sent away as

the defendant's. *Held*, that the servant was a competent witness for the plaintiff in an action of trover for the hay thus taken.

Held also, that the action could be maintained without proof of a demand upon the defendant for the hay, although it appeared that the defendant supposed the hay to be his own, and that this was known to the plaintiff.

Austin *v.* Walker.

Organization of juries by presiding judge — Questions for jury.

Affidavits cannot be received by this court to show what were the proceedings of the judge who presided at the trial of a cause in empanelling the jury from the list of jurors returned, though the case sent to this court provides, that testimony of that nature may be taken by the parties in relation to his proceedings in that respect, and laid before this court for such purposes as may be deemed legitimate. The statement contained in the case, or in the bill of exceptions allowed, is the only evidence to be considered of the facts involved in the inquiry whether the proceedings of the judge were legal.

Matters within the discretion of the court, in which the cause was tried, will not ordinarily be revised upon a case made for this court for the purpose of determining whether the discretion has been properly exercised.

It is within the discretion of the court to organize the traverse juries from the list of jurors returned, in any manner which the court may deem proper, and to re-arrange and organize them anew at any time, either with or without reference to the trial of a particular cause, there being no statute provisions upon the subject; and this may be done by removing a certain number of the jurors from one jury, and substituting others from the other jury, without motion therefor by either party, and when no cause of challenge exists against the jurors so removed.

It is not the right of either party to have a cause tried by a particular jury, as they may happen to be organized when the cause is called up for trial, although the practice may be to try the causes in their order upon the trial list by the two juries alternately, and, according to that practice, the cause would come in order before that particular jury.

The defendants having invented a stocking loom, and secured the right to the invention by letters patent of the United States, sold to the plaintiffs, for the consideration of $1000, half the right thereto, for all territory without the United States. It was at the same time covenanted between the parties that the plaintiffs should, as soon as practicable, send an agent to Europe for the purpose of exhibiting the invention and selling the looms, and the right to make, use, and vend the same, without the United States; that the

plaintiffs and their agent should make all suitable and proper efforts to dispose of said looms and right, to the best advantage; that if, upon using all proper and reasonable efforts, the plaintiffs and their agent should be unable to sell rights to the amount of $1000, and all the expenses of the agency, then the defendants would repay to the plaintiffs said $1000, and all the reasonable expenses of the agency, or convey to them one half of the right within the United States. The plaintiffs sent one Reynolds to Europe as their agent, who entered into a contract with Brettle & Co. in London, agreeing "to proceed forthwith to Scotland, for the purpose of consulting engineers or men of science, skilled in the construction of machinery of a similar kind, and by all needful experiments, additions, and alterations, so alter and improve the machine, as to enable it, by means of steam-power applied thereto, to manufacture and produce a perfect and entire stocking; and as soon as the machine was so perfected, to deliver it to Brettle & Co., and leave it in their possession two calendar months; that, during said two months, said Brettle & Co. should have the option to become the purchasers of the invention for the sum of fifteen thousand pounds." The plaintiffs brought their action of covenant to recover the $1000, and the expenses of the agency. Upon the pleadings an issue of fact was raised, whether the plaintiffs had given notice to the defendants of their failure to make sales to the amount of $1000, and the expenses of the agency, within a reasonable time after the execution of the covenant. The court instructed the jury that the Brettle contract was not warranted by the covenant entered into between the parties to the suit, and that consequently nothing which Reynolds had done under it could be deemed to have been done in the performance of his agency, so far as the defendants were concerned, unless the Brettle contract was made known to the defendants, and they assented that Reynolds might go on under it, and try to make the alterations required by it.

Held, that the instructions were erroneous, and that the question should have been submitted to the jury to determine, whether, under the circumstances, in the making of that contract, and in the efforts made in pursuance of it to improve the machine, the agent was or not using reasonable and proper efforts to effect sales of the machines and right, as contemplated by the covenant.

Notes of Recent English Cases.

House of Lords. June 16, 1856.

Caledonian Railway Co. *v.* Sprot.

Railway — Conveyance of land — Reserving of minerals — Right of support.

A Railway Act empowered any proprietor in conveying his land to the company to reserve the minerals, but if he should afterwards work them, he must give security to the company that the railway should not be endangered or interrupted. S. bargained with the company, and conveyed to them a tract of land, reserving the minerals with full liberty to work them, &c., subject to the provisions of the Act. In his claim for compensation, he did not include any estimate of loss, by reason of not being able to work his mines, near or under the railway. Several years after, he discovered a valuable mine under the railway, and finding that he could not work it, without danger to the latter, called upon the company for compensation.

Held, reversing the decision of the Court of Session, that S. could not now claim compensation for loss in not being able to work the mine.

By the Lord Chancellor. — The conveyance of the surface of land for a particular purpose, as for a house or railway, gives to the grantor an implied right of support, sufficient for the object contemplated, from the soil of the grantor adjacent as well as subjacent. If no purpose is stated, then such support as is reasonable for the land as it existed at the time of the grant.

June 19.

Caledonian and Dumbartonshire Junction Railway Company *v.* Helensburgh Harbor Trustees.

Act of incorporation — Agreement by promoters not sanctioned by Act.

The magistrates of H. agreed with the provisional committee of a projected railway company to allow the company certain privileges of taking land in the town, and laying rails for a side track to the harbor of H., the company to pay all the expenses of enlarging the harbor, and of obtaining an Act of Parliament for that purpose. The Harbor Act was obtained, and also the Railway Act; in the latter there was no provision authorizing or referring to the previous agreement; and the railway company refused to perform their part, and did not claim performance of the other part.

On a bill for specific performance, brought by the harbor

trustees, *held*, reversing the decision of the Court of Session, that specific performance could not be decreed, because the railway company had no power to make a harbor, which would be entirely beside the object of their incorporation.

It seems, that *Edwards* v *Grand Junction Railway Company*, 1 Rail. Cas. 173; *Lord Petre v. Eastern Counties R. R. Co.*, Ibid. 462, and other similar cases which have followed them, are unsupported in principle; but these cases are distinguished from the present by the nature of the contracts sought to be enforced, which were matters within the scope of the respective charters. (Per the Lord Chancellor and Lord Brougham.)

The custom sometimes adopted by committees of Parliament of omitting special clauses from acts of incorporation on the agreements of the promoters that the objects proposed to be attained by those clauses should in fact be carried out, appears to be illegal and improper.

Crown Cases Reserved.

July 2. REG. *v.* SCOTT.

Evidence — Examination of bankrupt — Admissible against him.

The Bankrupt Act, 12 & 13 Vict. c. 106, s. 117, enacts that the bankrupt may be examined by the court "touching all matters relating to his trade dealings or estate, or which may tend to disclose any secret grant, conveyance, or concealment of his lands, tenements, goods, money, or debts." And the Act makes it a crime for a trader to mutilate his books under certain circumstances. The defendant was tried for mutilating his books; the evidence against him consisted principally of his own examination in the Court of Bankruptcy; the question of the admissibility of this evidence being reserved. The case was argued before Lord Campbell, C. J., and Alderson and Bramwell, B. B., and Coleridge and Willes, J.J.

Held, that the evidence was admissible; that the act, while creating the offence, also authorized the examination, and compelled the bankrupt to answer; it therefore overruled the general maxim, that no one shall be compelled to criminate himself; and when the answers have been made, they must have all the effect of any other admission or statement of the party, lawfully obtained, and of course, be evidence against him in other courts. If Parliament had intended to protect the party from the consequences of giving his evidence, they would have so enacted, as in several instances cited.

Coleridge, J. dissented, and gave it as his opinion that the examination was only allowed for a specific purpose and in a certain mode, and that it could not be given in evidence upon another occasion upon which a similiar mode of inquiry was not lawful; that an important and long established rule of the common law ought not to be given up unless expressly repealed.

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Court of Appeal in Chancery. May 31.

FARINA *v.* SILVERWELL.

Trade mark — Injunction — Copyright.

The plaintiff filed a bill alleging an exclusive right to use a particular label and wrapper on bottles containing his cologne water, and that the defendant, a printer, was in the habit of making and vending spurious labels and wrappers in large quantities. It appeared that the defendant was in the habit of making and selling labels and wrappers in imitation of the plaintiff's, but there was some evidence tending to show that they were or might be used by the purchasers in trading with the genuine cologne water, much of which was sold without wrappers of this sort.

Held, by the Lord Chancellor, reversing the decision of Wood, V. C., that the plaintiff was not entitled to an injunction.

Where one designates his wares by a particular trade mark, he may restrain all others from selling wares not manufactured by him, with a similar mark, but not from attaching the mark to the genuine wares, which are lawfully in their possession, without the mark.

There is no copyright in a label used as a trade mark.

June 7 *and* 10. GRAINGER *v.* SLINGSBY.

Will — Construction.

A testatrix, after giving some pecuniary legacies, proceeded: — "To my dear brother Edward I leave everything I may be possessed of at my decease, for his life, and should he marry and have children of his own, to those children after; but, should he die a bachelor, at his death I leave the whole of my fortune, now standing in the funds, to E. S., &c."

At the date of her will, and also at her death, the testatrix was possessed of consuls and other government annuities, and also of a large sum in bank stock.

Held, that the words, "the whole of my fortune," were restricted by the expression "now standing in the funds," and that this description did not include the bank stock, which must go to the next of kin.

Prerogative Court. June 9.

FARMER *v.* BROCK.

Probate of will — Proof by one witness — Corroborated by circumstances.

The will offered for probate was proved by the two subscribing witnesses; an exception was taken to one of them, and it was proved that he had been tampered with, and could not be relied on. *Held*, that the will might be pronounced for, on the evidence of the unimpeached witness, there being circumstances to corroborate her evidence.

V. C. Wood's Court. June 28 and July 11.

DOODY *v.* HIGGINS.

Will — Construction — Bequest of personalty to persons "or their heirs forever."

A testator, by his will, bequeathed the residue of his personal property, "to be divided equally, share and share alike, between the following persons, or their heirs, forever."

It was heretofore held by Turner, V. C., (9 Hare, App. xxxii.) that the word "heirs" meant next of kin.

Held, that by next of kin, was meant next of kin according to the Statute of Distributions.

V. C. Stuart's Court. June 2.

AIREY *v.* HALL.

Devise of residue — Voluntary settlement afterwards without transfer.

Testator, by his will, gave all the residue of his real and personal estate in trust for his three daughters. By a voluntary settlement made a few months later, and just before his death, he assigned to trustees a large amount of personal property, consisting of cash, standing in his name at his bankers, and consols, upon somewhat different trusts for his daughters and their children. The stocks and cash remained in the testator's name till his death. *Held*, that as both classes of trusts were voluntary, those of the settlement, which first took effect, must prevail.

June 27. Re HALL.

Trustee — Solicitor — Misappropriation of funds.

A trustee, who was a solicitor, received a portion of the fund in a check, which he deposited with his bankers. He afterwards gave a certificate in the name of his firm, that the sum had been paid to the trustees and invested by them, but this had not been done at the date of the petition, several months after. Upon petition he was struck from the roll of solicitors.

Court of Session, (Scotland.)

FENTON *v.* LIVINGSTONE.

Legitimacy — Domicil — Marriage with deceased wife's sister.

A Scotchman, domiciled in England, was there married to the sister of his deceased wife, and had a son born there in 1809; the husband and wife continued to reside in England until their respective deaths. The son claimed a Scotch inheritance. *Held*,

that his *status* must be governed by the law of England, and it being shown that in England his legitimacy could not be impeached after the death of his parents, it was held that he must be considered legitimate in Scotland.

V. C. Wood's Court. April 7 and May 7.

Re WRIGHT'S TRUSTS.

Domicil — Legitimacy governed by domicil — Construction of will — "Children."

A., an Englishman, being much involved in debt, went to France in 1823, and lived there under a feigned name, and there cohabited with B., a French woman. Early in 1824, he was married to her by an English clergyman, but this marriage was admitted to be void, because contracted by him under his assumed name. In December, of that year, he had a daughter born to him by B.; A. continued to live in France until his death, in 1854, but there was no sufficient evidence of his having become domiciled in France before 1832, if at all. He was married to B. at the British embassy, and according to British forms, in 1841, and according to French forms in 1846, and on the latter occasion, an act of legitimization of the daughter was drawn up, but was signed by A. alone; the general rule of French law requiring it to be signed by both parents.

The Vice Chancellor held, that A. was domiciled in England at the time of his daughter's birth, and that this fact must regulate the *status* of the child. The child, therefore, was English, and even admitting that A. was domiciled in France at the time of his subsequent marriages, and that the act of legitimization was sufficient by French law, still these facts could not render the child legitimate who at her birth was an English child, the daughter of an English subject, and illegitimate.

A testator bequeathed stock to A. for life, and then to "his children" living at his death. A. died, leaving two legitimate children, and one born under the circumstances above stated. *Held*, that the latter could not take any portion of the bequests.

February 14 and March 11. JOHNSTONE *v.* HALL.

Lessor and sub-lessee — Reversioner — Remedy in equity by reversioner — Special damage.

A. demised land to B. for 999 years, and B. covenanted not to carry on trade, &c., &c., and that the premises should be used solely for private dwelling-houses. A. by will devised all his real estate to C. for life, with remainder to D. for life, and then to her eldest son in tail. C. was unmarried. B., the lessee, underlet to E., who underlet to F., who converted the premises into a boarding-

school for young ladies. (The covenant and alleged breach were very similar to those in *Wickenden* v. *Webster*, *ante*, p. 166.)

D. and E. as entitled to the first inheritance in reversion, filed a bill to restrain F. from such a use of the premises; the bill made C. the tenant for life, a party defendant, and alleged his privity with F. in the improper use of the premises.

Held, the bill must be dismissed with costs, because the injury to the property was of so minute a character that this court would not interfere by the extraordinary remedy of injunction in favor of a reversioner out of possession, unless special damage to his inheritance were shown.

Exchequer. May 27 and June 10.

RACKARON *v.* MARRIOTT.

Statute of Limitations — Acknowledgment or new promise.

The plaintiff called the attention of the defendant to his debt, on the ground that the Statute of Limitations would soon attach to it. The defendant replied in writing: — "I beg to say that I do not wish to avail myself of the Statute of Limitations to refuse payment of the debt alluded to in your note; but I have not the means of settling it, and must crave a continuance of your indulgence. My situation, as a salaried clerk, does not afford me the means of laying up a shilling; but in course of time, if I continue in my present employment, I may reap the benefit of my services in an augmentation of my salary, to enable me to propose some satisfactory arrangement with you."

Held, that this letter contained no sufficient promise or acknowledgment to bar the statute.

May 29 and June 10. BROWN *v.* BACHELOR.

Guarantee whether for past or future credits.

"In consideration of credit given to A. and B., I hereby agree to guarantee payment of all bills drawn by A. and accepted by B.; also, I agree to guarantee all balance that may be due from A. to B. This guarantee to include all bills now running, as well as the balance of account at this day."

Held, per Pollock, C. B., and Martin, B., to apply to future as well as then existing bills and balances.

Bramwell, B., thought it confined to the latter.

May 22 and June 10. HULL *v.* BOLLAND.

Patent — Practice — Notice of objections.

A statute, (15 & 16 Vict. c. 83, s. 41,) provides that the defendant in an action for infringement of a patent, shall deliver with his pleas particulars of his objections, and at the trial, no evidence

shall be given of any objection impeaching the validity of the letters patent, which shall not be contained in such particulars; that the place or places in which the invention is alleged to have been used, shall be stated in the particulars, and that a judge in Chambers may allow an amendment of the particulars on such terms as to him may seem fit. The defendant filed particulars alleging a previous general user of the invention in all corn mills, but not specifying any place.

Held, the defendant might give evidence at the trial of a user in a mill, in a certain place, the plaintiff not having applied to a judge to have the particulars amended.

May 30. STOKES *v.* COX.

Insurance — Description of premises — Subsequent alteration of premises.

The defendants insured for the plaintiff a range of buildings "comprising offices, warehouses, curriers' shops, drying rooms, having a stock of oil not exceeding 100 gallons, and tallow not exceeding 500 cwt., deposited therein, part of the lower story of such building being used as a stable, coach-house and boiling-house. No steam engine employed on the premises, the steam from said boiler being used for heating water and warming the shops." At the end was a note:

"N. B. — The process of melting tallow by steam in said boiler-house, and the use of two pipe stoves, are hereby allowed; but it is warranted that no oil be boiled, nor any process of japanning leather be carried on therein, or in any building adjoining thereto." On the policy was indorsed a clause that no alteration made after the insurance was effected should affect the policy, except the risk was thereby increased.

After the policy was made, the plaintiff, without notice to the defendants, erected a steam engine on the premises, and worked it by steam generated in the existing boiler. A fire occurred. The jury found that the risk had not been increased.

Held, that the description of the premises "no steam engine employed," &c., amounted to a warranty, or showed that the fact was deemed material, and that the alteration, therefore, suspended the risk, and as the fire occurred during the continuance of the alteration, the plaintiff could not recover. The case chiefly relied on was *Gillem* v. *Thornton*, 3 Ell. & Bl. 868.

Bramwell, B., dissented.

Queen's Bench. June 3 *and* 11.

JOB *v.* LANGTON.

Shipping — General and particular average.

A vessel, loaded with coal, was stranded at Newfoundland; the cargo was discharged and transhipped, and the vessel was afterwards got off, and taken to Liverpool for repairs.

Held, that the expenses of getting her off and taking her to Liverpool, were not chargeable to general average, but to particular average on the ship.

June 11. BRASS *v.* MAITLAND.

Ships and shipping — Duty of shipper of dangerous cargo.

It is the duty of the shipper of goods of a dangerous nature to give notice of their nature to the master, unless the latter knows or ought to have known it.

Crampton, J., doubted whether the rule would hold where the shipper himself had no actual notice of the nature of the goods.

July 3. MENNIE *v.* BLAKE.

Replevin — Does not lie to try right of property.

In England, the writ of replevin is a remedy for the unlawful disturbance of the plaintiff's possession of his chattel, and not to try a right. Therefore, where one who had possession of a horse and cart, as bailee, transferred it in payment to his own debt: —

Held, the owner could not maintain replevin against the purchaser, even after demand.

July 3. WATERFALL *v.* PENISTONE.

Chattel — Bill of sale — Fixtures.

Machines fixed to a mill with nuts and screws, but intended for the more convenient use of the mill, and not for the permanent improvement of the freehold, are trade fixtures, and therefore chattels, within 17 & 18 Vict. c. 36, requiring registration of all bills of sale of "personal chattels."

Common Bench. June 10.

ROBERTS *v.* BRETT.

Covenant — Construction — Condition precedent.

A. by indenture covenanted with B. to procure a vessel, and man, victual, and provide it, &c., and to take on board a telegraphic cable to be laid down between Africa and the coast of Sardinia, within a certain time, &c., and B. covenanted to pay A. £8000, (subject to deductions in case of delay, &c.,) the first instalment of £1000, within seven days after the arrival of the ship alongside of the wharf where the cable was lying. Each party agreed to give the other, within ten days of the date of the indenture, a bond with responsible sureties for the true performance of their respective covenants.

The plaintiff averred that he procured, manned, &c., a vessel, and brought her to the wharf, and requested the defendant to land the cable on board, &c. Plea, that he had never given a bond.

Held, that the giving of a bond by A. was a condition precedent to his right to proceed under the contract,

Notices of New Publications.

EARLY HISTORY OF THE UNIVERSITY OF VIRGINIA, as contained in the Letters of THOMAS JEFFERSON and JOSEPH C. CABELL, hitherto unpublished; with an APPENDIX, consisting of Mr. Jefferson's Bill for a Complete System of Education, and other illustrative documents; and an INTRODUCTION, comprising a brief Historical Sketch of the University, and a Biographical Notice of Joseph C. Cabell. Richmond: J. W. Randolph. 1856. pp. 528.

This volume contains a history, or, as the editor remarks, the best materials for a history, of the foundation of the University of Virginia. It is of interest, not only to all the *alumni* of that justly renowned institution, but to all friends of education. The correspondence shows clearly the unremitted, zealous and enlightened efforts of many of the eminent men of Virginia, and especially of the two who are named in the title page, in the cause which through many difficulties, and after many struggles, achieved so signal a triumph. Our readers will find in this volume much that will interest and instruct them; the letters, most of which have not been heretofore accessible to the public, contain many matters of interest, besides those which bear upon the immediate object of the publication, and the spirit which pervades them is one which we hope will be honored and kept alive by all Americans.

THE ELEMENTS OF MERCANTILE LAW. By THEOPHILUS PARSONS, L.L. D., Dane Professor of Law in Harvard University at Cambridge. Boston: Little, Brown & Co. 1856. pp. 617.

Professor Parsons has devoted much time to the study and practice of commercial law; he has the advantage, therefore, of having known and felt the wants of a student and practitioner in that department, and he has turned this experience to excellent account. The book which he now offers to the public, is intended to meet the wants of both, to guide the student in mastering principles, and to serve the practitioner, who is in haste for decisions; it is also well worthy of perusal by merchants. The text is confined, as it should be, to the statement of principles, while the notes contain careful and well collected references to all the latest cases.

After a preliminary general view of contracts, the author treats of sales, stoppage *in transitu*, guaranty, the statute of frauds, payment, negotiable paper, partnership, carriage of goods, limitations, interest and usury, bankruptcy and insolvency, the law of place, shipping, insurance.

The consideration of shipping and insurance occupies nearly one-half the book, and we cannot point to any other so compendious and excellent a summary on these important and interesting subjects. We heartily recommend our readers to consult them.

Upon the other topics, or most of them, the learned author had already given the results of his study in his work on contracts, and it is not, therefore, necessary that we should review them; it is only fair, however, to say, that the author anticipates an objection on this point, and states that the character and object of this work being quite different from that of the other, and these subjects coming within the scope of the present work, he felt authorized to consider them, which he has always done with a special view to their adaptation to this treatise.

COMMENTARIES ON THE COMMON LAW, designed as introductory to its study. By HERBERT BROOM, M. A., &c. Philadelphia: T. & J. W. Johnson & Co. 1856. pp. 674.

This elementary work, by the ingenious and learned author of "Legal Maxims," will be found to be of much use to the student in explaining the present state of the law on many subjects not often treated in the standard books. The author has been engaged for some years as a reader to the inns of court, and in the performance of his duties has been led especially to remark, he says, many points of difficulty and interest, which he considered to need elucidation; of these he has made copious notes, from time to time, and has endeavored in this work to throw light upon them. The book does not assume to be a complete introductory treatise on the entire common law, but rather an examination and explanation of certain portions of that law.

We would especially recommend the chapter on "The Nature of Rights, Enforcible by Action," that on "The Courts of Law," including the new County Courts, that on "Extraordinary Remedies," such as *mandamus*, *injunction*, *certiorari*, *quo warranto*, &c., and that on "The Proceedings at a Criminal Trial." The author admits into his text, as is usual with English writers on law, abstracts of important cases, but they are always succinct, and the whole work is within a very reasonable compass. The reprint is well executed, and is not burdened with any notes upon the law of this country, which, in so elementary a treatise, would be out of place.

ACTS AND RESOLVES, passed by the General Court of Massachusetts, in the year 1856: together with the Messages, &c., &c., &c. Published by the Secretary of the Commonwealth. Boston: William White, Printer to the State. 1856. pp. 396.

We have already considered the general legislation of the last session. The volume before us is the authentic edition of the law, of that session, both public and private, and is printed in the usual excellent style. All our Massachusetts readers must buy it.

OFFICIAL OPINIONS OF THE ATTORNEYS GENERAL OF THE UNITED STATES, advising the President and Heads of Departments in relation to their Official Duties, and Expounding the Constitution, Treaties with Foreign Governments and with Indian Tribes, and the Public Laws of the Country. Edited by C. C. ANDREWS, Counsellor at Law. Volume VI. Washington: Published by Robert Farnham. 1856.

We have in this volume a continuation of a most valuable legal publication. The idea of this series was undoubtedly originally suggested by the manuscript volumes of Opinions, which Mr. Wirt collected and had bound up during his occupation of the post of Attorney General. In it the proudest names of American Law have found some appropriate record of their labor and their wisdom. No previous volume possess so much of valuable public law as the one before us, and for learning, accuracy, and closeness of reasoning, Mr. Cushing will suffer by a comparison with no one of his predecessors. A vast number of questions, of first-rate importance to the jurist, are daily occurring in the various departments of the government; some of them of practice, and, therefore, of importance as precedents; others involving great principles, and, therefore, forming a part and parcel of the body of public law. Mr. Cushing has not confined himself to a discharge of the ordinary duties of his office by answering

inquiries propounded to him by others, but, of his own motion, has devoted himself to all the pursuits of his office as "the administrative head, under the President, of the legal business of the government." After a year of service we have, as the result of his experience and studies, a paper of twenty-nine pages upon "The Office and Duties of Attorney General." Among the more important opinions, we may mention, in passing, those upon "International Extradition," on p. 99; The Jurisdiction of Federal and State Courts, p. 103; Texas Bonds, p. 130; Surrendering Deserting Seamen, p. 148; Upon Harbor Improvements and Purpresture, p. 172, already published in this journal; the Courts of the United States, (271,) containing an analysis of the existing Constitution of the judicial system of the United States, and suggestive of desirable modifications thereof, &c., &c. No student of the law can find more valuable reading than in these opinions. If they have not the force of judicial decision, they come from one who formerly, (though too briefly,) occupied high judicial station with great and growing reputation, and they are reasoned with such power, and illustrated with such exhaustive learning, as to make them fully equal in convincing weight to ordinary judicial opinions. And besides, many of them are upon topics where we in vain look for the opinion of the courts. We would urge the student to turn now and then from the common place reading of the profession to the great studies which impart to the law the dignity of a science. If less immediate in the rewards they bring, they are the only studies which can win for the legal aspirant the true glory of a great lawyer.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Judge.
Abbott, John E.	Boston,	August 29, 1856.	Isaac Ames.
Allen, Charles F.	Worcester,	" 18,	Alexander H. Bullock.
Andrews & Huntington (*a*)	North Bridgewater,	" 6,	David Perkins.
Bearce, Larned S.	Boston,	" 27,	Isaac Ames.
Davies, Judah H. (*b*)	Boston,	" 20,	Isaac Ames.
Davis, James, jr.	Gloucester,	" 28,	Henry B. Fernald.
Dearborn, Henry	Boston.	" 27,	Isaac Ames.
Folsom, Samuel M. (*c*)	Somerville,	" 2,	Isaac Ames.
Gammon, Patrick	Scituate,	" 25,	David Perkins.
Gross, Charles (*b*)	Boston,	" 20,	Isaac Ames.
Hyde, Nathan D.	Boston,	" 11,	Isaac Ames.
Leonard, Lucius H.	Springfield,	" 12,	John M. Stebbins.
Lougee, Robert W.	Hanover,	" 12,	David Perkins.
McGrath, Terence A. T.	North Bridgewater,	" 6,	David Perkins.
Olmstead, Frederic A. } (*d*) Olmstead, George B. }	Middleborough,	" 27,	David Perkins.
Sibley, Joel	Worcester,	" 18,	Alexander H. Bullock.
Watson, Simon N. (*c*)	Somerville,	" 2,	Isaac Ames.
Whall, Charles E.	Boston,	" 23,	Isaac Ames.

(*a*) Andrews & Huntington. Individual names not rendered by Court.
(*b*) Davies & Gross. (*c*) Folsom & Watson. (*d*) Olmstead & Brother.